The BACK BENCHER

Seventh Circuit Federal Defenders

Vol. No. 23
Fall 2000 Issue

DEFENDER'S MESSAGE

Despite a couple of unusually Autumn-like days lately, this Fall Issue is still a bit premature, but with a months-long RICO trial on the horizon and some rare but welcome good news from the Supreme Court in *Apprendi v. New Jersey*, 2000 WL 807189 (June 26, 2000), it is time to get to press. *Apprendi*, as you probably already know, stated that a factor that authorized a sentence above the otherwise applicable statutory maximum is an element of the offense and must be submitted to the jury and proven beyond a reasonable doubt. While *Apprendi* dealt with a hate-crime statute, the decision will probably apply most frequently in drug cases and will raise issues regarding numerous offenses.

Because of the importance of the *Apprendi* decision and its implications, the Federal Defender's Office for the Central District of Illinois will host a special seminar in the very near future.

Justice O'Connor, in her dissent, reflected the importance of the *Apprendi* decision, stating that it could be viewed as a "watershed change in constitutional law." Our seminar will make use of materials compiled by the Federal Public Defender's Office for the Southern District of Florida that they have generously agreed to provide to us for the benefit of all criminal defense lawyers. Following the format of the materials provided to us, the seminar will address (1) the constitutional background of the *Apprendi* decision, the precise holding, the majority's dicta and the more far-reaching language of the concurrences; (2) the possible effect of the decision on various federal criminal statutes; (3) strategies for utilizing *Apprendi* at different stages of your on-going cases and possible prosecutorial responses; (4) strategies for employing *Apprendi* in cases now pending on appeal, whether at the briefing stage or post-argument; and (5) possible use of *Apprendi* in post-collateral proceedings under 28 U.S.C. §§ 2241 or 2255. We hope to be able to conduct this seminar in the Federal Courthouse in Springfield. Details on this seminar will be sent out separately. Again, we thank the Federal Public Defender's Office for the Southern District of Florida for generously agreeing to send us their *Apprendi* materials.

I am also pleased to announce that our office will once again be hosting its annual golf-outing in conjunction with the Illinois Association for Criminal Defense Lawyers (IACDL, formerly the IACJ) at "The Den at Fox Creek" in Bloomington, Illinois on Friday, September 22, 2000. Details are included in the flier attached to the back of this issue.

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This year's annual panel attorney seminar is being held in conjunction with the Community Defender's Office for the Northern District of Illinois and the IACDL at the Palmer House in Chicago from 8:30 a.m. until 4:00 p.m. on Friday, October 13, 2000. Nationally known speakers, including Michael Tigar, have agreed to speak at this year's seminar.

Finally, it is my honor to invite you to join us after the seminar for the annual dinner and roast hosted by the Illinois Association of Criminal Defense Lawyers on October 13, 2000 at the Palmer House in Chicago. Each year, the IACDL selects a "deserving" member of the criminal defense lawyer for the honor of being roasted. This year, they have decided that I deserve a good roasting! Do I have to wait to hear the stories that these roasters have to tell before I deny it all? Seriously, I hope you will join me and your fellow members of the defense bar for an enjoyable evening in the luxurious setting of the Palmer House. Cocktails are at 6:00 p.m. and the dinner and roast is at 7:00. A flier is attached at the back of this issue.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

CONGRATULATIONS!

By: Richard H. Parsons
Federal Public Defender
Central District of Illinois

After seven years as Chief Judge of the Seventh Circuit, Judge Posner's term ended on July 31, 2000, and we at the Federal Defender's Office congratulate him on the excellent manner in which he administrated the court during his tenure. Undoubtedly, Judge Posner will be remembered as one of the greatest jurists this nation has ever seen, among the likes of Learned Hand and Oliver Wendell Homes. Indeed, his opinion in United States v. Catton, 89 F.3d 387 (7th Cir. 1996), and his brilliant dissent in United States v. Redmon, 138 F.3d 1109 (7th Cir. 1998), which reads like a treatise on the Fourth Amendment, are fondly remembered and cited by my office. Despite his considerable duties as Chief Judge, Judge Posner also authored innumerable books and articles over the preceding years.. Hopefully, with a now lighter administrative load, Judge Posner will be able to devote even more time to his writing and address pressing issues, such as the nonsensical sentencing scheme which now reigns supreme in federal criminal law. As noted in the previous issue of *The Backbencher*, Judge Posner has made intelligent and eloquent criticisms of the current sentencing scheme, and a more developed treatment in a full length treatise would be most welcome.

Fortunately for those of who practice in the Seventh Circuit, Judge Posner's replacement is more than worthy to take over the leadership of the Circuit. Judge Flaum was appointed United States Circuit Judge for the Seventh Circuit on May 5, 1983 and entered on duty June 1, 1983. He is a graduate of Union College, receiving a B.A. degree in 1958, and Northwestern University School of Law, receiving a J.D. degree in 1963 and a LL.M. degree in 1964.

Judge Flaum served as United States District Judge for the Northern District of Illinois, 1975-1983; First Assistant United States Attorney for the Northern District of Illinois, 1972-1975; First Assistant Attorney General, 1970-1972, and Assistant Attorney General, 1969-1970, State of Illinois; and Assistant State's Attorney for Cook County, Illinois, 1965-1969. Judge Flaum has served as a member of the Judicial Conference Committee on the Administration of the Bankruptcy System, 1979-1984; the Advisory Committee on Bankruptcy Rules, 1984-1987; and the Committee on the Administrative Office, 1987-1989.

This broad range of experience makes Judge Flaum well suited for the position of Chief Judge, and we have no doubt that his brilliance, practicality, and congeniality will serve him well in performing his new duties. Congratulations and good luck!

CLIENT COMMUNICATIONS

By: Richard H. Parsons
Federal Public Defender
Central District of Illinois

Chief Judge Joe B. McDade has expressed concern about an increasing number of complaints by defendants regarding the failure of their court-appointed lawyers to communicate with them. As we all know, Illinois Rule of Professional Conduct 1.4 requires us to properly communicate with our clients. The Rule states:

Rule 1.4. Communication

(a) A lawyer shall keep a client reasonbley informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ILCS S.Ct. Rules of Prof. Conduct,

RPC 1.4. Second only to complaints about the mishandling of client funds, this rule generates the most complaints to the Attorney Registration and Disciplinary Committee. While this fact alone is incentive to communicate effectively with our clients, for the criminal defense attorney, the Sixth Amendment guarantee of effective assistance of counsel should be the real genesis of our compliance with this Rule. Indeed, without a frequent and free-flowing exchange of information between lawyer and client, effective assistance of counsel is impossible.

Of course, we all know that the occasional client can make unreasonable demands on us, and, despite our diligent efforts, complaints will still be made about our representation in general and our communications with the client specifically. Indeed, when a defendant has been convicted and lost his direct appeal, frequently his only means of getting back through the courthouse door is a complaint regarding his counsel. This unfortunate consequence of lengthy sentences and dramatically reduced post-conviction rights is yet another reason why you should make every effort to not only communicate with your clients, but also document those communications in anticipation of a charge being made against you later.

In other words, in addition to always responding promptly to client letters, every effort should be made to respond to missed telephone calls as well, and such incoming and outgoing calls should be logged. Moreover, time spent visiting with the client, investigating, and working with witnesses should also carefully be recorded somewhere in the file. While the necessity of keeping such records may seem obvious, these basic procedures are easily overlooked when faced with the heavy caseloads that most of us carry. Unfortunately, there will always be lawyers who do not communicate with their clients, just as there will always be clients who falsely accuse their attorneys of neglecting their cases. To prevent yourself from being the former, and to protect yourself against the latter, communicate frequently and document always.

Dictum Du Jour

"Neither fire nor wind, birth nor death can erase our good deeds."

Buddha

* * * * * * * * * *

Marking an X in either the "yes" or "no" box of a ballot might not seem like a particularly demanding task. But in this labor election on whether to unionize, one ingenious worker forsook those unimaginative choices, ignored the ballot's clearly written directions, and instead scribbled "neither nor" on his ballot, creating a quandary that put the outcome of the election in doubt.

National Labor Relations Board v. AmeriCold Logistics, slip op. (7th Cir. 6/6/2000).

* * * * * * * * * *

It is not the function of the trial judge to instruct the jury on abstract principles of law which have no bearing on the case. Extraneous law may be quite as prejudicial as extraneous facts. Verdicts should be based only on the evidence in the case and the pertinent law as applied to that evidence.

United States v. Hill, 417 U.S. 279, 281 (5th Cir. 1969)(footnote omitted).

* * * * * * * * * *

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi v. New Jersey, ___ S.Ct. ___ 2000 WL 807189 (6/26/00).

* * * * * * * * * *

Third, I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence .... But it is equally true that his expected punishment has increased as a result of the narrowed range and the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum 'entitles the government' ... to more than it would otherwise be entitled .... Further ... it is likely that the change in the range available to the judge affects his choice of sentence. Finally, in numerous cases ... the aggravating fact raised the whole range--both the top and the bottom. Those courts, in holding that such a fact was an element did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law.

Apprendi v. New Jersey, ___ S.Ct. ___ 2000 WL 807189 (6/26/00)(concurring opinion of Justice Thomas joined by Justice Scalia).

* * * * * * * * * *

"You hang around the barber shop long enough, you end up getting your hair cut."

An F.P.D. client explaining his relapse to his probation officer.

* * * * * * * * * *

As identified in the certificate of appealability, Levine argues on appeal that he "is entitled to relief under 28 U.S.C. section 2255 because the Assistant United States Attorney who handled his case at the trial level did not live in the Northern District of Indiana."

Levine v. United States, slip op. (7th Cir. July 19, 2000)

CHURCHILLIANA

As a leader of the Conservative Party Opposition in the 1950s, Churchill grew quite restless and bored as a Socialist academic pontificated against the big business and the rich.

Churchill replied, "Verbosity may be the long suit of the honourable gentleman, but it's not long enough to cover his ass-ininity."

A CD-Rom containing helpful information for Seventh Circuit practitioners is available from the Clerk's Office. The CD contains: the Practitioner's Handbook; the Circuit Rules; the Seventh Circuit Annual Report; Links to 7th Circuit Web sites; the 7th Circuit Bar Association Directory; CJA Educational Presentations; and Forms & Handouts. Although much of this information is contained on the Seventh Circuit's web-site, the CD has a search function not available on-line.

And we're sure many of you are aware that right at our fingertips is a source of great usefulness ... web-sites! Are you aware, however, that the Seventh Circuit has a web-site? In addition to the items contained on the CD mentioned above, the Circuit's web-site contains docket sheets and opinions. It can be found on the world wide web at www.ca7.uscourts.gov. One especially useful function is the daily listing of opinions filed that day. This feature is a fast and free way to stay abreast of recent case law.

All of the districts within the Seventh Circuit likewise have their own web-sites. The Central District's web-site is located at www.ilcd.uscourts.gov. This site also contains helpful information, including the local rules, forms and handouts, and selected orders entered by the various district judges.

SPEAKING OF THE WORLD WIDE WEB

REMEMBER ...

This issue of *The Back Bencher* - along with several past editions - can be accessed via the internet at www.ca7.uscourts.gov. Click on the link marked "Federal Defenders".

U CHECK IT OUT!

LET JUDGES BE JUDGES!

Downward Departures After *Koon*

By: Alan Ellis, Esq.

*[Editor's Note: This is a continuation of a series of articles on downward departures recognized by the courts since 1996 in light of the Supreme Court's decision in United States v. Koon. **Part One** discussed "Diminished Capacity"; **Part Two** discussed "Post-Offense Rehabilitation"; **Part Three** discussed "Aberrant Behavior"; **Part Four** discussed "Civic, Charitable, or Public Service; and **Part Five** discussed "Combination of Factors".]*

Part 6 - Substantial Assistance

Once upon a time, it was thought that a federal prosecutor had the unfettered discretion not to file a §5K1.1 motion even if a defendant met the requirements of "substantial assistance in the investigation or prosecution of another person who has committed an offense." (U.S.S.G. §5K1.1.) The first clear indication that there were any limits on prosecutorial discretion came in the case of Wade v. United States, 504 U.S. 181 (1992), in which the Supreme Court held that a prosecutor's refusal to file a section 5K1.1 motion "is subject to constitutional limitations that district courts can enforce," and that a defendant would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end." (Wade v. United States, 504 U.S. 181, 185-86 (1992). Even before Wade, however, circuit courts had stated that, like other matters traditionally left within the prosecutor's discretion, a prosecutor's decision not to depart downward under §5K1.1 was not without limit:

We deem these limited principles of review equally applicable to the government's exercise of its discretion under section 5K1.1 to move for departures. Other courts have reached similar conclusions. See, e.g., [United

States v.] Rexach, 896 F.2d [710] at 713-14 (noting that "the decision to make or withhold a motion for downward departure must be given the same high level of deference as other prosecutorial decisions," but recognizing that a prosecutor's "determination of dissatisfaction" with the defendant's assistance "cannot be made invidiously or in bad faith"); United States v. Bayles, 923 F.2d 70, 72 (7th Cir. 1991) (suggesting that review of prosecutor's decision not to depart would be available under principles applicable to other prosecutorial decisions); United States v. Mena, 925 F.2d 354, 356 (9th Cir. 1991) (acknowledging possibility of review where government induces defendant's cooperation "based upon a promise of a motion for departure," or otherwise acts in "bad faith"). (United States v. Doe, 934 F.2d 353, 361 (D.C. Cir.), cert. denied, 502 U.S. 896 (1991).)

More recently, courts have begun to circumscribe more narrowly a prosecutor's decision not to file a §5K1.1 motion. In general, to date, the courts have recognized four broad categories of cases where the prosecution's refusal to file a §5K1.1 motion warrants a court's intervention, namely, where the refusal by the government constitutes (1) punishment of a defendant for exercising a constitutional right, (2) bad faith by the government in fulfilling its end of a cooperation agreement, (3) nonconstitutional impermissible reasons, and (4) the "cutting edge" theory that post-Koon, a court can depart downward under §5K2.0 based on substantial assistance notwithstanding the prosecutor's refusal to so move under §5K1.1.

Punishment for exercising constitutional right in Wade, the Supreme Court held that a prosecutor's refusal to file a §5K1.1 motion could not be based on an "unconstitutional motive," providing as examples a refusal based on "the defendant's race or religion." (Wade, 504 U.S. at 186.) Post-Wade, examples of impermissible constitutional motives have expanded to include prosecutorial decisions penalizing a defendant for exercising his Sixth Amendment right to go to trial, United States v. Khoury, 62 F.3d 1138, 1142 (9th Cir. 1995) (defendant made "substantial threshold showing" required by Wade by presumptively establishing that the government refused to file a §5K1.1 motion because he exercised his constitutional right to go to trial); United States v. Paramo, 998 F.2d 1212, 1214 (3d Cir. 1993) ("we hold that absent a motion by the government, the district court has authority to grant a downward departure for substantial assistance if the government's sole motive for withholding a 5K1.1 motion was to penalize the defendant for exercising his constitutional right to a trial"), cert. denied, 510 U.S. 1121 (1994); U.S. v. Easter, 981 F.2d 1549 (10th Cir. 1992), and depriving a defendant of the benefit of counsel, United States v. Treleaven, 35 F.3d 458 (9th Cir. 1994) (holding that district court had authority to depart pursuant to §5K1.1 based on government attorney's improper ex parte contact with defendant, which prevented defendant from obtaining benefit of right to counsel).

Bad faith: Failure to File Motion

The government is under no obligation to ever file a §5K1.1 motion--or even to listen to what a defendant seeking a sentence reduction has to say. Once, however, the government agrees--either expressly in a written agreement or implicitly by allowing a defendant to cooperate--and a defendant begins to cooperate, he or she is relying upon the implicit commitment of the government to judge his or her substantial assistance in an objective and good faith manner. United States v. Isaac, 141 F.3d 477 (3d Cir. 1998) (holding that government act in good faith is implicitly part of any agreement to file departure motion if, in the government's discretion, defendant provided substantial assistance).

In United States v. Rexach, 896 F.2d 710, 712-14 (2d Cir. 1990), a pre-Wade case, the Second Circuit outlined the principles for judicial review of prosecutorial discretion to make substantial assistance motions under U.S.S.G. §5K1.1. Rexach held that, where a plea agreement includes an obligation by the government to make a §5K1.1 motion in exchange for the defendant's cooperation, the prosecutor's decision not to make the motion is judicially reviewable. This is true even if the determination of whether the defendant has rendered "substantial assistance" is expressly left to the discretion of the prosecutor. The prosecutor's discretion is not completely unlimited because there is an implied obligation of good faith and fair dealing in every contract. The scope of the government's discretion, though broad, does not "permit it to ignore or renege on contractual commitments to defendants."

The use of "may" in the plea agreement does not alter the government's obligation to act in good faith. (United States v.Hernandez, 17 F.3d 78 (5th Cir. 1994).) In Hernandez, the plea agreement contained the language "the government may make a motion for downward departure at sentencing." (Emphasis added.) The record shed no light on the degree of discretion, if any, the parties intended for the government to retain by the use of the permissive word "may" as opposed to the mandatory "will" or "shall," citing:

> [w]e have serious doubts that either party meant for the government to retain unbridled discretion merely by using [the word "may" in the

agreement].(Id. at 83.)

The First Circuit expressed doubt that Hernandez knowingly and intentionally walked into an illusionary bargain.

Hearing

At least one circuit has established ground rules for litigating a "bad faith" challenge. To prevail on a claim of breach of a cooperation agreement based on "bad faith," the Second Circuit has ruled that a [d]efendant must first allege that he or she believes the government is acting in bad faith. Such an allegation is necessary to require the prosecutor to explain briefly the government's reasons for refusing to make a downward motion. Inasmuch as a defendant will generally have no knowledge of the prosecutor's reasons, at this first or pleading step the defendant should have no burden to make any showing of prosecutorial bad faith. Following the government's explanation, the second step imposes on defendant the requirement of making a showing of bad faith sufficient to trigger some form of hearing on that issue. (United States v. Kahn, 920 F.2d 1100, 1106 (2d Cir. 1990).

The Second Circuit has not specified the type of hearing required in such an instance, stating that "whether it be merely oral argument or should include a formal evidentiary hearing is a matter that lies within the sound discretion of the district court." (United States v. Knight, 968 F.2d 1483, 1487 (2d Cir.1992) (citations omitted).) "At a minimum, however, the district court should consider any evidence with a significant degree of probative value, and should rest its findings on evidence that provides a basis for [appellate] review." (United States v. Leonard , 50 F.3d 1152, 1157 (2d Cir. 1995).) In Knight, the defendant challenged his sentence on appeal, arguing that the government acted in bad faith when it refused to perform its part of the plea agreement by making a "substantial assistance motion under §5K1.1 after he testified as a government witness at his codefendant's trial. Although the section of the plea agreement relating to Knight's cooperation did not specify the kind of cooperation that Knight was expected to provide, the record indicated that the government's principal reason for offering the agreement was to secure Knight's truthful testimony at the trial of his codefendant. The agreement provided:

The United States reserves the right to evaluate the nature and extent of defendant's cooperation and to advise the Court of the nature and extent of any such cooperation at the time of sentencing. The United States agrees that if, in the sole and unfettered discretion of the United States, the circumstances of defendant's cooperate warrant a departure by the Court from the Sentencing Guidelines range determined by the Court to be applicable, the United States will make a motion pursuant to § [5K1.1] of the Sentencing Guidelines stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. (Emphasis added).

After Knight kept his promise and testified, the government exercised its "sole and unfettered discretion" and refused to make the motion for a downward departure. As required by Kahn, Knight then asserted that the government acted in bad faith. The government, seeking to explain its refusal to move, offered six reasons to the district court including:

1. Knight's cooperation was untimely;
2. Knight was more culpable than his codefendant against whom he testified;
3. Knight pled guilty only because his brother had done so;
4. The plea agreement benefited Knight in other ways;
5.The clause in the plea agreement that promised a possibility of a substantial-assistance motion "was not something that was bargained for"; and
6. Knight's trial testimony was "inconsistent" with the testimony of another witness.

The appellate court found that reasons one through four all related to circumstances that preceded the making of the agreement and that the government was aware of them at the time it promised to consider making the substantial- assistance motion:

Not only would be it unfair for the government to rely upon such known, pre-agreement circumstances as reason for not moving, it would have been fraudulent to have induced the defendant's plea with a promise that the government already knew it was not going to keep.

After finding that reason number five was "frivolous," and that reason number six--that Knight's trial testimony was "inconsistent" with that of another witness--did not equate with a claim that he did not testify truthfully, the court of appeals rejected the lower court's conclusory finding of "good faith" and remanded for further proceedings on the issue of whether the government acted in back faith in refusing to move for a downward departure.

In United States v. Lezine, No. 97-2571, 1999 U.S. App. LEXIS 1111, 13-14 (7th Cir. Jan. 28, 1999), the Seventh Circuit held that when the government seeks to escape an obligation under a plea agreement on the grounds that the defendant has failed to meet some precondition, the defendant is entitled to an evidentiary hearing. In Lezine, the plea agreement provided that "assuming the defendant's full and truthful

cooperation," the government "shall" move the court to depart downward from the applicable sentencing guideline range for a statutory minimum sentence. The court of appeals found that the plea agreement imposed a specific obligation on the government. Because the government made a definitive promise to Lezine, his due process rights demanded that the court determine whether or not he had failed to meet the precondition of "full and truthful cooperation." (Id. at 21.)

Earlier this year, in United States v. Mikaelian, No. 97-50174, 1999 U.S. App. LEXIS 2337 (9th Cir., Feb. 17, 1999), the Ninth Circuit held that although the government has the discretion to decide whether to file a §5K1.1 motion, "it does not have the last and only on whether a defendant provided substantial assistant." If a defendant contends that he or she did, indeed, cooperate and that the government is acting in bad faith in refusing a motion, a factual dispute arises requiring an evidentiary hearing.

Defendant Not Allowed to Cooperate

In addition, if a court finds that the government in bad faith barred a defendant from additional opportunities to cooperate under circumstances wherein the government agreed to file a §5K1.1 motion upon the defendant's providing substantial assistance, the court should order the government to file a §5K1.1 motion even if a defendant did not, as a result, provide "substantial assistance." (See United States v. Laday, 56 F.3d 24 (5th Cir. 1995) (cooperation agreement implies government will give defendant adequate opportunity to cooperate); United States v. Ringling, 988 F.2d 504 (4th Cir. 1993) (same).) In Laday, the defendant was charged with exporting and conspiracy to export stolen vehicles after authorities discovered a scheme to export a stolen backhoe to the country of Belize. Laday and the prosecutor entered into a plea agreement in which he agreed to plead guilty to exportation of a stolen vehicle and the government agreed, in part, to move at sentencing for a §5K1.1 downward departure if Laday provided substantial assistance to the government's further actions in the matter.

Laday subsequently entered a plea of no contest rather than guilt, and continued maintaining a lack of guilty knowledge in his nterview with the probation office. Because of his continued protestation of innocence, the government made no effort to determine whether he could furnish substantial assistance in its investigation or prosecution of others. At the sentencing hearing, Laday moved to withdraw his plea, contending that the government breached the plea agreement by denying him an opportunity to provide substantial assistance. The district court rejected the motion, concluding that to force the government to interview Laday would be a futile exercise considering his denial of knowledge that the backhoe was stolen.

On appeal to the Fifth Circuit, the government argued that Laday's denial of such knowledge made any assistance he might offer unsubstantial, thus excusing its conduct. The circuit court disagreed:

> The government was aware of Laday's claim of a lack of guilty knowledge when it committed to the amended plea agreement calling for his plea of nolo contendere. The government may not now use that claim to avoid its obligations under the express terms of the plea agreement.(Id. at 26.)

The Fifth Circuit thus remanded for specific performance of the cooperation agreement to allow the defendant the opportunity to cooperate and for appropriate resentencing before a different judge. (Id.) Similarly, in Ringling, the government entered into a plea agreement with the defendant that included a cooperation provision that the government would bring the defendant's cooperation to the attention of the sentencing judge. The Fourth Circuit ruled that this "implicitly required the government to debrief Ringling prior to sentencing in order that the government could make known 'at the time of sentencing' the extent of Ringling's cooperation." (Ringling, 988 F.2d at 505.) The government, however, did not debrief Ringling and consequently could not provide the court with information regarding his cooperation at sentencing. The Fourth Circuit remanded the case to the district court for resentencing, expressly directing that "[p]rior to the resentencing, Ringling should be given a reasonable opportunity to provide the Government with information of the nature contemplated by the plea agreement."(Ibid.)

Nonconstitutional Impermissible Reasons

In United States v. Anzalone, 148 F.3d 940 (8th Cir. 1998), vacated by the court on grant of rehearing on September 22, 1998, reinstated by the court on denial of rehearing October 7, 1998, the Eighth Circuit held that the government could not base its decision whether to file a §5K1.1 motion on factors other than the substantial assistance provided by the defendant. In Anzalone, the government advised the court that it had received information that defendant Anzalone had used and possessed controlled substances, violating a provision of his plea agreement that he "not commit any additional crimes whatsoever." The government refused to file a §5K1.1 motion because of the defendant's

violation of the plea agreement. The district court held that the government's position was rational. The Eighth Circuit reversed and remanded to the district court to
determine whether the defendant's assistance was substantial.

In particular, the court explained:

Once the government concludes that a defendant has provided substantial assistance, and has positively assessed in that regard "the cost and benefit that would flow from moving," (Wade, 112 S. Ct. at 1844), it should make the downward departure motion and then advise the sentencing court if there are unrelated factors, such as [defendant]'s alleged post-plea agreement drug use, that in the government's view should preclude or severely restrict any downward departure relief. The district court may of course weigh such alleged conduct in exercising its downward departure discretion. Id.; see also United States v.
Stockdall, 45 F.3d 1257, 1261 (8th Cir. 1995).

Sentencing is "primarily a judicial function." Mistretta v. United States, 488 U.S. 361, 390, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). The prosecutor's role in this aspect of sentencing is limited to determining whether the defendant has provided substantial assistance with respect to "a sentence," advising the sentencing court as to the extent of that assistance, and recommending a substantial assistance
departure. See U.S.S.G. §5K1.1 & comment. (n.3). The desire to dictate the length of a defendant's sentence for reasons other than his or her substantial
assistance is not a permissible basis for exercising the government's power under §3553(e). (Id. at 261.)

In addition, unless the defendant breached his cooperation agreement in a way that damaged the case in which he was cooperating, and unless the basis of the breach was unknown and unanticipated at the time the government entered into the cooperation agreement, the defendant's breach does not justify the government's refusal to make a §5K1.1 motion. (Compare United States v. Brechner, 99 F.3d 96, 100 (2d Cir. 1996) (reversing order that compelled
government to make §5K1.1 motion after defendant had lied to government).)

§5K2.0 departure for substantial assistance Courts have found that a departure is permitted under §5K2.0 in the absence of a government motion for substantial assistance under various circumstances.

Notwithstanding the absence of a government § 5K1.1 motion, the courts have already held that a departure for substantial assistance under §5K2.0 was permitted where defendant provided substantial assistance to branches of government other than those that engage in prosecutorial activities when the assistance does not involve "the investigation or prosecution of another person who has committed an offense." (See, e.g., United States v. Sanchez, 927 F.2d
1092, 1093-94 (9th Cir. 1991) (assistance in the prosecution of a civil forfeiture case); United States v. Khan, 920 F.2d 1100, 1107 (2d Cir. 1990) (assistance in rescuing an informant kidnapped by foreign drug dealers); United States v. Stoffberg, 782 F. Supp. 17, 19 (E.D.N.Y. 1992) (assistance to a congressional committee).

In addition, the Second Circuit has held that a district court could consider a departure under §5K2.0 for a defendant who cooperated with local law enforcement authorities. (United States v. Kaye, 140 F.3d 86 (2d Cir. 1998).) The cutting edge solution is that post-Koon a court can depart downward under §5K2.0 based on substantial assistance notwithstanding the prosecutor's refusal to so move under §5K1.1. Such an approach encourages a court to recognize that it no longer has its hands tied by an often arbitrary decision by the government as to what constitutes "substantial assistance." Koon made it crystal clear that unless a particular factor had been declared "off limits" by the U.S. Sentencing Commission, (e.g., race, sex, national origin, creed, religion, socio-economic status, lack of guidance as a youth, or drug or alcohol dependence), the factor may be a ground for a downward departure.In short, the court may not depart based on a forbidden ground. Anything else is fair game.

As the D.C. Circuit initially held in In re: Sealed Case (Sentencing Guidelines "Substantial Assistance"), 149 F.3d 1198 (D.C. Cir. 998), vacated, in part, reh'g, en banc, granted, 159 F.3d 1362, 1998 U.S. App. LEXIS 29803 (D.C. Cir. 1998),
because substantial assistance without a government motion is an unmentioned factor under the guidelines, "even where the government files no motion, Koon authorizes district courts to depart from the Guidelines based on a defendant's substantial assistance where circumstances take the case out of the relevant guideline heartland." (Id.)

Conclusion

It appears, when all is said and done, that there is little distinction between
agreements that provide that the government will file a §5K1.1 motion if the defendant provides substantial assistance and those in which the government retaining "unfettered" and "sole" discretion may do so if the defendant renders substantial

assistance. Both agreements still require that the government act "in good faith" and/or that the prosecutor's refusal to file is not not based upon an unconstitutional motive or not rationally related to a legitimate government end. Thus, in those districts where a defendant has provided substantial assistance, but nonetheless wishes to exercise his or her constitutional right to trial or even simply to present evidence in mitigation of punishment, the government cannot withhold an otherwise earned §5K1.1 motion. Nor can the government withhold a §5K1.1 motion merely because the defendant has breached an unrelated term of the plea agreement. This may invite inquiry into the prosecutor's decision-making process and, in some cases, judicial review as to whether the cooperation did, in fact, rise to the level of "substantial assistance." In any case, it appears that §5K1.1 motions are no longer solely the province of the prosecution.

Note: The assistance of Wayne Anderson, an associate in the firm's California office, is gratefully acknowledged.

Alan Ellis is a former president of the NACDL and has offices in both San Francisco and Philadelphia. He is a nationally recognized expert on sentencing issues and specializez and consults with other lawyers throughout the United States in the area of federal sentencing. He has graciously allowed us to reproduce articles he has written for his quarterly federal sentencing column for the ABA's Criminal Justice magazine.

We extend our sincere thanks and gratitude to Mr. Ellis for sharing his expertise with us.

FACTUAL FINDINGS BY A JURY BEFORE IMPOSITION OF A MANDATORY MINIMUM SENTENCE:

New Support From The Supreme Court

By: Daniel G. Cronin
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Introduction

Not for the first time during this sentencing hearing in federal court, the judge gives you a pained look as you renew a crucial argument:

"Your Honor, clearly the jury convicted my client of possessing crack cocaine with the intent to distribute. What is not clear, however, is the quantity of crack cocaine involved. Because your Honor refused to require a jury finding on that issue, we simply have no way of knowing whether the jury believed my client possessed the 4.2 grams of crack found in the car he occupied with three other individuals, or whether the verdict was based solely on the 1.9 grams of crack found in his pocket. Consequently, a mandatory minimum sentence of five years for possessing between five and fifty grams of crack cocaine is inapplicable. Instead, my client should be sentenced within the Sentencing Guidelines' range for 1.9 grams of crack possessed by a defendant in Criminal History Category II: 30 - 37 months."

Unfortunately, the judge is not at a loss for words, either:

"Counselor, we have been through this before. The Supreme Court held in McMillan that a sentencing judge can find predicate facts for a mandatory minimum sentence by a preponderance of the evidence. I've read the Supreme Court's decision in Apprendi which you've cited, and the majority says it's not overruling McMillan. That's good enough for me. I can't say that I'm convinced beyond a reasonable doubt that the defendant possessed the crack found in the car, but I'm fifty-one percent certain of that fact, and that's all the certainty the law requires. I'm holding your client accountable for the crack cocaine in the car, as well as the quantity found on his person."

As unfortunate as this scenario may be, defendants are faced with even worse circumstances if they have been convicted of two or more prior felony drug offenses, and are then sentenced for a drug offense which would normally carry a ten-year minimum sentence. Under 21 U.S.C. §841(b)(1)(A), "such person shall be sentenced to a mandatory term of life imprisonment without release..." Since the maximum term of imprisonment for drug offenses carrying a ten-year minimum is already life imprisonment (id.), a drug defendant with the requisite priors has his or her mandatory minimum sentence increased to life imprisonment. In

essence, this statutory house of cards, in which sentence enhancement is piled on top of sentence enhancement, has as its foundation the determination of drug quantity by the sentencing judge by a mere preponderance of the evidence.

Fortunately, at least one district court judge has shown the courage to refuse to sentence a defendant to life imprisonment based upon the preponderance of the evidence standard. In United States v. Murgas, 31 F.Supp.2d 245, 254 (N.D. 1998), Judge Howard Munson held that clear and convincing evidence would be required to support an upward departure to life imprisonment. Significantly, Judge Munson made that ruling even though he indicated he was "fifty-one percent certain" that the defendant had committed a double homicide. See Matt Fleischer, "A Judge Carries Burden of Proof," The National Law Journal, July 3, 2000. Nevertheless, Judge Munson concluded, "[G]iven the dramatic impact of the departure sought, the court opts to apply a heightened burden of proof in the sentencing hearing." Murgas, 31 F.Supp.2d at 253.

The Second Circuit has yet to review Judge Munson's bold decision, but in the meantime, encouraging news has come from an unlikely source: the Supreme Court. The mathematics of a badly fractured Supreme Court mean that the "majority" view that mandatory minimum sentences can be based on a preponderance of the evidence has only three adherents on the highest bench. The other six justices now agree that facts triggering a mandatory minimum sentence must be determined by a jury beyond a reasonable doubt.

Apprendi v. New Jersey: The Majority Opens The Door

In Apprendi v. New Jersey, decided on June 26, 2000, the issue was straightforward: "The question presented is whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." Apprendi v. New Jersey, 2000 WL 807189, *3 (U.S.).

In analyzing this issue, the majority opinion reviewed the historic importance of the jury's role in determining facts beyond a reasonable doubt. After that historical review, the majority opinion declared, "Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." Apprendi, 2000 WL 807189, *10 (FN 10). Moreover, the requirement that a jury determine each element beyond a reasonable doubt is not negated by the terminology used: "Merely using the label 'sentencing enhancement' to describe the latter surely does not provide a principled basis for treating them differently." Apprendi, 2000 WL 807189, *7.

Consequently, the Supreme Court imposed on state courts the same requirement it had imposed on federal courts last year, in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999):

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in Jones. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Apprendi, 2000 WL 807189, *13.

Unfortunately, the majority opinion also cited to the Supreme Court's decision in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411 (1986). Apprendi, 2000 WL 807189, *11. In McMillan, the Supreme Court held that a sentencing judge could determine a predicate fact for a mandatory minimum sentence by a preponderance of the evidence. Apprendi, 2000 WL 807189, *11 , citing McMillan, 477 U.S. at 86-88.

While the majority opinion in Apprendi denies that its decision overrules McMillan, that disclaimer seems to be less than a hearty endorsement of McMillan:

> The principal dissent accuses us of today "overruling McMillan." Post, at ---- 11. We do not overrule McMillan. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict – a limitation identified in the McMillan opinion itself. Conscious of the likelihood that legislative decisions may have been made in reliance on McMillan, we reserve for another day the question whether stare decisis considerations preclude reconsideration of its narrower holding.

Apprendi, 2000 WL 807189, *12 (FN 13) (emphasis added).

B. Thomas And Scalia In Concurrence: McMillan Overruled

Significantly, Justices Thomas and Scalia disagreed that McMillan was

left undisturbed by the majority's opinion in Apprendi. Thomas argued in his concurrence, joined by Scalia, that the weight of caselaw leads to a much broader conclusion than in the majority opinion:

A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule the Court adopts today...No multi-factor parsing of statutes, of the sort that we have attempted since McMillan, is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.
Apprendi, 2000 WL 807189 , *18-19 (emphasis added) (Thomas, J., concurring).

This concurrence then states explicitly what one would infer from the passage above: "I think it clear that the common-law rule would cover the McMillan situation of a mandatory minimum sentence…" Id. at *30. In reaching this conclusion, Thomas's concurrence notes, "The mandatory minimum 'entitl[es] the government,' to more than it would otherwise be entitled...It is likely that the change in the range available to the judge affects his choice of sentence." Id. (citation omitted).

Furthermore, Thomas's concurrence maintained that Supreme Court precedent supports the conclusion that facts triggering a mandatory minimum sentence are an element of the offense:

[I]n numerous cases, such as Lacy, Garcia, and Jones…the aggravating fact raised the whole range – both the top and bottom. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law.

Apprendi, 2000 WL 807189 , *30 (Thomas, J., concurring).

O'Connor, Rehnquist, Kennedy, And Breyer In Dissent: McMillan Overruled

The dissent authored by Justice O'Connor and joined by three other justices - Rehnquist, Kennedy, and Breyer - had no difficulty concluding that the majority opinion overrules McMillan:

[T]he Court appears to hold that any fact which increases or alters the range of penalties to which a defendant is exposed – which, by definition, must include increases or alterations to either the minimum or maximum penalties – must be proved to a jury beyond a reasonable doubt. In McMillan, however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the court not only to admit that it is overruling McMillan, but also to explain why such a course of action is appropriate under normal principles of stare decisis.

Apprendi, 2000 WL 807189 , *35 (O'Connor, J., dissenting).

In arguing that Apprendi overruled McMillan, O'Connor's dissent conceded a point long known to members of the defense bar:

Indeed, as a practical matter, a legislated mandatory "minimum" is far more important to an actual defendant. A judge and a commission, after all, are legally free to select any sentence below a statute's maximum, but they are not free to subvert a statutory minimum. And, as Justice Thomas indicates, all the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum, apply a fortiori to any matter that would increase a statutory minimum.

Apprendi, 2000 WL 807189 , *35 (O'Connor, J., dissenting).

Conclusion

Admittedly, the majority opinion in Apprendi disclaims the notion that mandatory minimum sentences will be disturbed by its decision, even while reserving reconsideration of McMillan for another day. Yet the conclusion reached in Apprendi by six out of the nine justices - two in concurrence and four in dissent - indicates that a formal overruling of McMillan may not be long in the making. In the meantime, according to two-thirds of the Supreme Court, Apprendi overrules McMillan, and facts triggering a mandatory minimum sentence must be found by a jury beyond a reasonable doubt.

Why Johnny Can't Phone

By: David Mote
Deputy Chief Federal Defender

Normally, when we consider procedural issues in our criminal cases, we are concerned with the rules of

criminal procedure or proper courtroom procedure. Unfortunately, however, even the procedure required for a telephone call with your client can be an ordeal.

The Illinois Department of Corrections (I.D.O.C.) now requires a written request faxed or mailed at least 24 hours ahead of time to request that a defendant be allowed to call his attorney. That call will, of course, be collect and, as discussed below, inordinately expensive. That request for a call from the client must explain, according to I.D.O.C., what the attorney and client will discuss and an explanation of why the attorney can't make a personal visit to the prison to discuss the matter with his client. (A district court in Texas took a contrary view, cutting the voucher submitted by court-appointed counsel because it was not "reasonable" for court-appointed counsel to repeatedly visit his client at the remote jail where he was housed, since routine matters could be "handled more expeditiously and economically by the intelligent use of the telephone." United States v. Smith, 76 F. Supp. 2d 767 (S.D. Tx. 1999)) A committee of the Illinois Association of Criminal Defense Lawyers has decided to look into this burdensome and intrusive procedure but, for now, defense counsel must simply cope with this impediment to conversing with incarcerated clients by telephone.

Should counsel be able to speak with his or her client, however, it will not be cheap. One of the many inmate phone systems that our office takes calls from charges, according to the automated recording "$2.85 for the first minute and .40 for each additional minute." If an inmate makes 30 cents per hour in prison, he could work 8 hours and he still couldn't afford a one-minute call home. Of course, it is not the inmate who pays for a collect call. It is the person being called.

The inmate normally has no choice of whether to call collect or which telephone carrier to use. In our local jail, all calls must be collect through the jail's contract inmate telephone provider. While security requirements may justify higher than normal rates for inmate calls, there is also a huge mark-up involved. Class action suits filed in Illinois, Indiana, Ohio, New Mexico, New York, New Hampshire and Wisconsin are challenging deals where state and county governments receive as much as .60 of every dollar charged on collect inmate calls. An article in the Sante Fe New Mexican reported that New Mexico's Department of Corrections awarded a three year contract to the company that offered to pay the Department of Corrections the highest commission. According to an Associated Press article, a spokeswoman for Central Management Services indicated that Illinois received about half the money inmates spent on calls. According to that article, last year Illinois received $12 million in revenue from state pay phones.

Inmates are, of course, literally a captive audience. When the state prison or county jail restricts phone access to the use of pay phones that allow only collect calls a single carrier with whom the government has negotiated an arrangement involving a 100% mark-up over the actual costs to be kicked-back to the government, the inmate has no choice. Nonetheless, not everyone is sympathetic. My local paper had a piece on the lawsuits on the op-ed page. In short, their opinion was "if you don't have the dime, don't do the crime." (Actually, they didn't phrase it that eloquently.) Reading their article, one would suppose that it is only crimes committed by poor people that they find objectionable. The article in the local paper, and I suppose the reaction of the public at large (pun intentional) misses three important points. First, it is not only prisons that are gouging inmates on calls. County jails, housing pre-trial detainees, do it as well. Thus, people who have not been convicted of any crime and are, at least in theory, presumed innocent, are being stuck with these outrageous costs too. Second, people are sentenced to serve time as a punishment. They are not sent to jail or prison for the guards or the phone system to punish them. Finally, as mentioned above, it is not the inmate who pays for the collect call. It is the inmate's family, often already impoverished by the imprisonment of the family primary breadwinner, who pays. And it is also the inmate's counsel, often court-appointed and handling the case at a reduced rate that may not even cover the costs of office overhead, who pays.

It is time to change a procedure in which the contract is awarded to the company that marks up the costs the most and kicks-back the money to local government at the cost of a captive audience, their families and their attorneys.

CA-7 Case Digest

Compiled by: Jonathan Hawley
Assistant Federal Defender

RECENT REVERSALS

HABEAS CORPUS / §2255

U.S. v. Marcello 212 F.3d 1005 (7th Cir. 2000). On appeal upon the denial of a petition brought pursuant to 28 U.S.C. § 2255, the Court of Appeals

held that where the Government argues that the Certificate of Appealability was wrongly issued, the Court of Appeals still has jurisdiction to consider both whether the Certificate of Appealability was properly issued and the merits of the appeal. The Court stated that ordinarily it has discretion to either determine whether the Certificate of Appealability issued properly or go directly to the merits of the case. The Court of Appeals also clarified the 1-year limitations period for the filing of a petition under § 2255. After examining a number of different methods, the Court concluded that the proper method for computing the 1-year limitation period is the "anniversary rule." In other words, the first day of the 1-year limitation period is the day after the Supreme Court denies certiorari, thus giving defendants until the close of business on the anniversary date of the certiorari denial to file their 2255 petition. The anniversary date is the last date to file even when the intervening period includes the extra leap year day.

Walker v. O'Brien, 2000 WL 804552 (7th Cir. 2000). In this consolidated case of a number of habeas corpus petitions, the Court of Appeals overruled a previous line of authority. Specifically, the Court had previously held that the provisions of the Prison Litigation Reform Act applied to a request for federal collateral relief, whether under 28 U.S.C. §§ 2241, 2254 or 2255. However, the Court noted that all other federal circuits to consider the question had held that the PLRA did not apply to a request for federal collateral relief. After reviewing these opinions from the other circuits, the Seventh Circuit reversed its previous line of authority and came in line with the other federal circuits, specifically holding that State prisoners who challenge the results of prison disciplinary proceedings or other habeas actions need not comply with the requirements of the PLRA because such habeas corpus actions, whether brought under sections 2241, 2254 or 2255, are not "civil actions" within the meaning of the Act. Additionally, the Court held that persons in state custody challenging the results of a prison disciplinary proceeding must proceed under 28 U.S.C. § 2254, and not under 28 U.S.C. § 2241. Finally, the Court of Appeals held that the requirement of Certificate of Appealability imposed by 28 U.S.C. § 2253(c)(1)(a) does not apply to a state prisoner's action under § 2254.

Moore v. Anderson, No. 2000 WL 715003 (7th Cir. 2000). In this habeas corpus action, an Indiana State prisoner argued on appeal that his sentence for robbery was improperly enhanced by a jury determination that he was a habitual offender. The Court of Appeals agreed and ordered the district court to issue the petitioner a writ granting him relief under § 2254. The mandate from the Seventh Circuit, however, did not address whether the State of Indiana could retry the sentencing enhancement in the Indiana courts. Then, nine days after the issuance of the mandate, the Supreme Court decided Monge v. California 524 U.S. 721, 1998, which held that the double jeopardy clause did not prevent retrial of sentencing issues in non-capital cases. Accordingly, in the district court, the State argued that Monge applied to the petitioner's case, notwithstanding the non-retroactivity principle enunciated in Teague v. Lane 489 U.S. 288, 1989. The district court, however, refused to allow the State of Indiana to retry the petitioner on the habitual offender status. The State then appealed to the Seventh Circuit, which resulted in this opinion. On appeal, the State contended that Monge should apply and that is should be permitted to retry the elements of the petitioner's habitual offender enhancement. The petitioner, however, responded that Monge is inapplicable in light of the non-retroactivity principle enunciated in Teague. The Court of Appeals, however, rejected the petitioner's argument and noted that although Monge created a new rule of constitutional criminal procedure, the non-retroactivity principle of Teague favors only the State because the State should not be penalized for relying on the constitutional standards that prevailed at the time the original proceedings took place. Accordingly, the non-retroactivity principal designed to protect the State's interest in the finality of criminal convictions entitles the State, not the petitioner, to object to the application of a new rule to an old case. Therefore, the non-retroactivity principle did not bar the State from invoking Monge in support of its request to retry the petitioner's habitual offender enhancement.

Horton v. U.S., No. 98-3481 (7th Cir. 06/29/00). In the petitioner's appeal from the district court's denial of his 2255 petition, the Court of Appeals again addressed the timeliness requirements of the AEDPA. The petitioner, after the Seventh Circuit had affirmed his conviction and sentence, filed a petition for a writ of certiorari which was denied by the Supreme Court. He did not petition the Supreme Court for rehearing. The petitioner then filed the instant 2255 petition in the district court one year and two days after the Supreme Court denied his petition for certiorari. Notwithstanding this fact, the petitioner argued that his 2255 motion was not barred by the AEDPA's 1-year limitation period because his conviction did not become final under § 2255(1)

until after his opportunity to move the Supreme Court to reconsider its denial of certiorari had passed. He argued that he had 25 days to file such a motion with the Court, and thus his conviction was not final until that 25 day period had expired. The Court of Appeals, however, rejected that argument and held that for purposes of the 1-year statute of limitations, the petitioner's conviction became final upon the Supreme Court's denial of the petition for certiorari. The Court of Appeals held that a defendant's conviction becomes final under § 2255(1) when the Supreme Court denies the defendant's petition for a writ of certiorari. The Court did note, however, that petitions for rehearing filed in the Court of Appeals have a different effect. Specifically, when a federal prisoner decides not to seek certiorari at all, his conviction becomes final on the date the Court of Appeals issues the mandate in his direct criminal appeal. If, however, the petitioner files a petition for rehearing in the Court of Appeals, such a petition automatically stays the mandate until the petition for rehearing is decided. Thus, the filing of a petition for rehearing delays the Court of Appeal's last act in disposing of the case, which is the issuance of the mandate. However, a petition for rehearing before the Supreme Court does essentially nothing with respect to the matters of concern. A rehearing petition does not stay the denial of certiorari. The denial of certiorari is therefore effective when issued, and it disposes of the case before the Supreme Court.

Jefferson v. Wellborn, 2000 WL 862846 (7th Cir. 2000). In this appeal, a state court petitioner appealed the district court's dismissal of his habeas petition as untimely and its refusal to issue a Certificate of Appealability. Procedurally, after the Illinois Appellate Court affirmed the petitioner's convictions on direct appeal, the petitioner moved for leave to file a late Petition for Leave to Appeal the decision with the Illinois Supreme Court. The Supreme Court granted leave to file a late petition and thereafter eventually denied the Petition for Leave to Appeal on the merits. The district court, when considering the timeliness of the habeas petition, concluded that the time for filing the petition had to be calculated from the actions of the Illinois Appellate Court because a mere petition for permission to file a late appeal was insufficient to toll the time under § 2244(d)2. The Court of Appeals, however, reversed and noted that the petitioner was still engaged in the process of pursuing his State Court remedies when seeking leave to file a late petition. The Illinois Supreme Court decided, as it was entitled to do, to accept the late petition for normal consideration, and it later issued an order denying review. The Supreme Court order of ultimately denying the petition indicated that it was not rejecting the petition on timeliness grounds. Thus, this course of events was enough to make his appeal in his State proceeding one that was properly filed for purposes of computing his time for filing a petition for collateral relief in federal court.

Carrera-Valdez v. Perryman, 211 F.3d 1046 (7th Cir. 2000). On appeal from a district court's dismissal of a petition filed under 28 U.S.C. § 2241 for lack of jurisdiction, the Court of Appeals reversed and held that it had jurisdiction to consider whether the petitioner was wrongfully denied parole. The petitioner came to the United States in 1980 during the Cuban boat lift and proceeded to commit a number of crimes while in the United States. Eventually, an administrative order excluded him from the United States on the basis of his criminal record, but Cuba refused to accept his return. The petitioner has been in federal custody ever since. Although the Court of Appeals held that the district court had jurisdiction to consider the petitioner's argument that he was wrongfully refused parole into the general population, the court also held that the petitioner was not entitled to be released. Specifically, the court noted that although Cuba refused to take him back, and therefore his federal custody was likely to stretch out indefinitely, the Supreme Court held almost fifty years ago that an excludable alien may be detained indefinitely when his country of origin will not accept his return. Although noting that several justices in more recent years have expressed unease with that decision, it is conclusive in the Court of Appeals, and, accordingly, the Court of Appeals ordered the district court to deny the petition on the merits.

Washington v. Smith, No. 99-2383 (7th Cir. 07/06/00). In this habeas corpus action, the Court of Appeals affirmed the district court's grant a habeas corpus petition where the petitioner asserted that his counsel was ineffective at trial. Specifically, the petitioner showed through post-conviction evidentiary hearings that his counsel failed to subpoena or interview his alibi witnesses, failed to read the police reports, and, indeed, never attempted to contact a single defense witness. The Wisconsin Appellate Court, however, affirmed the petitioner's conviction and found any deficiencies did not make "the result of the trial unreliable or the proceeding fundamentally unfair." On appeal in the Seventh Circuit, the Court of Appeals first noted that the Supreme Court's recent decision in Williams v. Taylor, 120 S.Ct. 1495 (2000), has

clarified the standard which a federal court should use when determining whether a state-court adjudication resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). Under the Supreme Court's interpretation of this phrase in Williams, a federal habeas court may grant habeas relief whenever the state court "unreasonably applied a clearly established principle to facts of the prisoner's case." However, an unreasonable application of federal law is different from an incorrect application. Thus, according to the Court of Appeals, it could issue a writ of habeas corpus only after finding that the state-court decision was both incorrect and unreasonable. Applying this standard, the Court first concluded that the standards set forth in Strickland v. Washington were clearly established Federal Law. Secondly, the Court concluded that the Wisconsin court's application of this law was unreasonable. Given that the attorney failed to essentially perform *any* investigation or contact a single witness, his excuse that he was "too busy" to do so was insufficient to show that the attorney made a reasonable decision that makes particular investigations unnecessary. Moreover, when turning to the prejudice determination required by Strickland, the Court of Appeals noted that the Wisconsin court failed to use the proper test. Specifically, rather than using the Strickland test requiring an inquiry into whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," the Wisconsin court applied the Lockhart test set forth above. Applying the proper standard, the Court of Appeals concluded that the petitioner was prejudiced by his counsel's deficient performance because his counsel "repeatedly demonstrated a lack of diligence required for a vigorous defense."

INEFFECTIVE ASSISTANCE

U.S. v. Patterson, 2000 WL 706020 (7th Cir. 2000). On appeal where the defendant argued that he was deprived the effective of assistance of counsel, the Court of Appeals reversed the defendant's conviction and ordered a new trial. In a multi-defendant case, the defendant's attorney was late many days, did not appear at all on other days, and, in fact missed seven days of testimony, four or five sessions of jury instruction conferences, and most of the other defendants' closing arguments. On appeal, the defendant argued that he was deprived of counsel at trial, although the Government responded that the defendant always had counsel through the other attorneys for the other defendants. The Court of Appeals rejected this argument. The Court of Appeals noted that although the district court oftentimes would ask the defendant if he was willing to allow another attorney present to represent him, the district court made an inadequate inquiry into whether or not the defendant had actual knowledge of other options, such as delaying the trial until his attorney returned. The Court of Appeals assumed that the defendant was unaware of his other options or the district judge never asked whether the other lawyers were pursuing a sensible defense strategy for the defendant. If, to the other defense lawyers, "standing in" for the defendant meant only defending their own client's interest and reporting to the defendant's attorney at day's end what had just transpired, then the defendant was effectively unrepresented. Accordingly, under these circumstances, the Court of Appeals reversed the defendant's conviction and held that he was deprived of counsel at trial.

JURY INSTRUCTIONS

U.S. v. Torres-Ramirez, 213 F.3d 978 (7th Cir. 2000). In prosecution for conspiracy to distribute crack cocaine, the Court of Appeals reversed the defendant's conviction, found that the district court had improperly instructed the jury, and that insufficient evidence existed to convict the defendant of conspiracy. The defendant engaged in a one time sale of crack cocaine to a co-defendant. Moreover, the co-defendants demonstrated their trust in the defendant by allowing him to leave with the money and return later with the cocaine. The district court, when instructing the jury, properly instructed them that "a mere one-time sale of a large quantity of drugs is not sufficient by itself to prove the seller has joined a drug distribution conspiracy." However, the Court further instructed the jury as follows: "To establish the seller has joined a conspiracy to distribute cocaine, the Government must also prove beyond a reasonable doubt the existence of evidence of an enduring relationship that directly or indirectly shows the seller had knowledge of the conspiracy to distribute drugs." The Court of Appeals found this sentence misleading and false. First, the sentence was misleading in that the statement that "the jury only need to find the existence of evidence" should have instead stated that the Government must show a criminal agreement beyond a reasonable doubt. Secondly, the statement that "the seller had knowledge of the conspiracy to distribute drugs" was false because, again, the district judge should have

instructed the jury to look for an agreement to join the distribution network, not just knowledge of its existence. Finally, having found this error, the Court of Appeals held that remand was not appropriate in the case because taking the evidence and inferences in the best possible light in favor of the prosecution, the evidence still did not support a conviction under the proper legal standards. Specifically, the Court stated that it believed this case to be a "one sale case." The Court noted that fronting may create an inference of an agreement. However, the fronting in this case showed only that the defendant may have conspired with other people, not the co-defendants in this case. Finally, the Court of Appeals concluded that the record did not demonstrate multiple sales that could support an inference of conspiracy, but rather in fact declined an invitation to supply the group with more drugs.

JURY SELECTION

U.S. v. Patterson, 2000 WL 706020 (7th Cir. 2000). In an Appeal where the defendants challenged the district court's jury selection procedure as an impermissible interference with their exercise of peremptory challenges, the Court of Appeals held that the previous *per se* automatic reversal rule, outlined by the Court in United States v. Underwood, had been undermined by the Supreme Court's decision in United States v. Martinez-Salazar. Specifically the Court noted that in Martinez-Salazar, the Supreme Court indicated that the automatic reversal rule was unnecessary and was based on precedent which existed prior to the creation of the harmless error rule. Although noting that the Supreme Court decision did not specifically overrule Underwood, the Seventh Circuit, in light of this language, decided to re-evaluate its per se automatic reversal rule. In doing so, the Court noted that not every interference with the exercise of a peremptory challenge always affects a substantial right. Thus, the question becomes whether the interference had a substantial and injurious effect or influence in determining the jury's verdict. Such could occur in some cases such as in Underwood, where an exceptionally confused jury selection process may have had such an effect. Reversal would be warranted in such a case. However, where the possibility that an error altered the outcome of the case is too remote to be worth investigating, application of harmless error review is appropriate. Accordingly, the Court of Appeals essentially reversed Underwood.

U.S. v. Polichemi, 2000 WL 898693 (7th Cir. 2000). On petition for rehearing, the Court of Appeals flip-flopped from its opinion previously issued in the case. Originally, the Court of Appeals had concluded that the defendants' right to the intelligent exercise of peremptory challenges had been improperly interfered with by the district court where the court refused to strike for cause a juror who worked for the U.S. Attorney's office. Thus, the defendant's were forced to use a peremptory challenge on a juror who should have been excused for cause. Having found an interference, the Court then applied the Underwood automatic reversal rule and ordered a new trial. On rehearing, the Court of Appeals again concluded the juror should have been excused for cause. However, in light of Martinez-Salazar, the Court refused to apply the automatic reversal rule. Instead, the Court noted that, as in Martinez-Salazar, no one sat on the juror who was presumably biased because the defendant's struck the juror with a peremptory challenge. Thus, the entire process of jury selection was not infected with ambiguity, and, therefore, the district court's error was harmless.

MISCELLANEOUS

U.S. v. Canino, 212 F.3d 383 (7th Cir. 2000). The defendant in this case, after being convicted of a continuing criminal enterprise that imported and distributed many tons of marijuana, filed a motion under the old version of Federal Rule of Criminal Procedure 35(a), arguing that his convictions were unlawful under Rutledge v. United States and Richardson v. United States. Because the defendant was indicted on September 29, 1987, the old version of Rule 35(a) applied to him, which stated that "the court may correct an illegal sentence at any time." Proceeding under this old Rule, the district court considered and rejected the defendant's arguments on the merits. The Court of Appeals however, vacated the decision of the district court and remanded the case with instructions to dismiss the case for want of jurisdiction. Specifically, the Court of Appeals held that former Rule 35(a) is limited to the correction of an illegal *sentence*. The Rule does not cover arguments that the conviction is itself improper, for such arguments must be raised in a 2255 petition. Thus, because the defendant argued that his convictions themselves were improper, the district court had no jurisdiction under the old Rule 35(a) to consider the merits of his arguments.

SENTENCING

U.S. v. Szakacs, No. 98-3932 (7th Cir. 05/02/00). On appeal for convictions of conspiracy to steal firearms from a licenced firearms dealer, the Court of Appeals vacated the defendants' sentences because their offense level

was improperly enhanced under § 2K2.1(b)5. That guideline section provides a four level enhancement where the defendant used or possessed any firearm or ammunition in connection with another felony offense. The government in the district court asserted that any federal offense (in this case, conspiracy to steal firearms from a licenced dealer) which includes conduct that can also be characterized as a state law offense (here, conspiracy to commit burglary) qualifies for the enhancement. The district court agreed, and the defendants appealed. The Court of Appeals noted that this was an issue of first impression in the Seventh Circuit and stated the issue as follows: Does a State Law crime that occurs simultaneously with another federal weapons crime qualify as another felony offense for purposes of enhancement under 2K2.1(b)5. After noting that the Fifth Circuit had concluded that the enhancement was warranted under such circumstances but the Sixth Circuit had concluded otherwise, the Court of Appeals concluded that the enhancement is not warranted under these circumstances. In support of this conclusion, the Court of Appeals noted that because almost every weapons crime could also be charged as a state law offense, the Government's reading of the guideline would lead to a routine four level enhancement in every relevant case and defeat the purpose behind the structure of the guidelines. Accordingly, the language "another felony offense" contained in the guideline section would be rendered superfluous, and the Court of Appeals declined to render a statute's language "a dead letter."

U.S. v. Patterson, 2000 WL 706020 (7th Cir. 2000). In prosecution for a drug conspiracy and weapons charges, the defendants argued on appeal that the district court improperly refused to consider a downward departure based upon the fact that, although they were acquitted a 924(c) gun charge, the application of the gun bump in the sentencing guidelines resulted in a higher sentence than if had they been convicted of the 924(c) charge. Specifically, although the defendant's were acquitted of the 924(c) charge, U.S.S.G. §2D 1.1(b)(1) requires the district court to increase the offense level unless it is clearly in probable that the weapon was connected to the offense. Given this adjustment, the defendant's offense level was a 43 requiring a mandatory sentence of life. Had he been convicted of the 924(c) charge and therefore not received the adjustment, however, his sentencing range would have been 420 months to life rather than a mandatory life sentence. Although the Court noted that the Constitution does not guarantee a completely rational system of sentencing, the Court also noted that Congress has provided an escape hatch for unusual situations, specifically, departure under 18 U.S.C. § 3553(b). Indeed, the sentencing commission recognized that the anti-double counting norm could lead to sentencing perversions; and invited departures via section 2K2.4. Given the anomalous result in this case, the Court of Appeals concluded that, after reviewing the sentencing proceedings, they were unsure whether the district judge understood the extent of his discretion under Section 3553(b) and therefore remanded the case so that the district judge could consider his options.

U.S. v. Frazier, 213 F.3d 409 (7th Cir. 2000). On Appeal, the Court of Appeals reversed the defendant's sentence based on his argument that the district court improperly denied his Motion to Compel the Government to file a Section 5K1.1 departure motion for substantial assistance or in the alternative to withdraw his plea. The government refused to file the departure motion on the grounds that the defendant lied on the stand regarding his deal with the government during his co-defendant's trial. The district court, relying on this argument, found only that "there was doubt in his mind that [the defendant] did not live up to his end of the bargain." The Court of Appeals, however, found that because the court did not elaborate or provide sufficient findings for its reasoning, it would remand for a more complete explanation of what facts the court found that led to its conclusion that the defendant did not live up to his end of the bargain. Indeed, the court noted that the Government cannot unilaterally determine that a defendant has breached the plea agreement and refuse to uphold its end of the bargain. Rather, an evidentiary hearing is required for the courts to determine if a substantial breach of the plea agreement has occurred. Therefore, remand was necessary.

U.S. v. Walton, 2000 WL 767891 (7th Cir. 2000). In prosecution for taking approximately $90,500.00 from a Citibank branch automatic teller machine, the defendant argued that the district court improperly imposed restitution. At sentencing, although there were three defendants, the district judge required each defendant to pay the entire $90,500.00 in restitution. In doing so, the judge stated that he thought that he was required to impose the full amount of restitution on each defendant. On appeal, the Court of Appeals held that the district court improperly believed that it was required to impose the full amount of restitution on the defendant. Specifically, although the Mandatory Victims Restitution Act requires that

each victim be awarded the full amount of restitution, the statute also provides that where more than one defendant contributed to the victim's loss, the court may make each defendant liable in full or apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant. In the present case, given the fact that the district court waived the defendant's fine because of financial inability to pay, the court could have considered whether or not a portion smaller than the entire amount of restitution would have been appropriate to charge against that particular defendant. Accordingly, because the district court was laboring under a misinterpretation of the MVRA, the Court of Appeals remanded for consideration of whether the defendant should be liable for payment of the full amount of restitution or for a portion reflecting his level of contribution to the victim's loss and economic circumstances.

U.S. v. Ross, 2000 WL 892806 (7th Cir. 2000). In prosecution for possession of a firearm by a felon, the Court of Appeals vacated the defendant's sentence because the district court failed to adjust the defendant's federal sentence to reflect a reduction of 34 months, to account for time the defendant spent imprisoned on a related state burglary conviction before his federal sentencing. Rather than adjust the defendant's federal sentence, the district court attempted to order the BOP to credit the defendant's federal sentence with the 34 months spent in state custody. The Court of Appeals, however, noted that U.S.S.G. 5G1.3(b) required the court to impose the federal sentence concurrently with the undischarged residential burglary sentence. Moreover, not only did the district court have no authority to order the BOP to give the defendant the credit, but 18 U.S.C. 3585(b) forbids the BOP from giving credit for presentence custody when that credit has been applied against another sentence. Finally, although the 34-month reduction would put the defendant's final sentence under the mandatory minimum 15-year sentence required by 18 U.S.C. 924(e)(1), the Court held that the sentence was still permissible because the total sentence for purposes of 924(e) should be viewed as the sum of the sentence reflected on the federal district court's order of judgement (in this case, 154 months) *plus* the 34 months the defendant had already served. Although 924(e) requires that the defendant served not less than fifteen years, the statute does no specify any particular way in which the imprisonment should be achieved. Accordingly, a sentence reflecting the 34 month reduction did not violate the 924(e) required sentence of at least fifteen years.

U.S. v. Watts, No. 99-1684 (7th Cir. 04/07/00). In prosecution for heroin distribution, the Court of Appeals reversed the district court's grant of a downward departure for extraordinary family circumstances on cross-appeal by the government. The district judge premised her downward departure on a psychologist's report wherein the psychologist posited that the seven year old child of the defendant has a strong bond with his mother and became anxious and depressed as a result of learning that his mother may possibly not continue to live with him. The Court of Appeals, however, concluded that such conditions are likely to occur to any child under similar circumstances. Thus, under such ordinary circumstances, to allow departure would give district courts license to ignore the guidelines whenever sentencing parents. Moreover, the district judge reduced the defendant's sentence from 235 to 170 months. However, nothing suggested that such a departure would "do the slightest good" for the child. Indeed, the Court doubted that the hardship to the child would be any different with the lesser sentence, thereby obviating the purpose of the departure.

RECENT AFFIRMANCES

EVIDENCE

U.S. v. Ryan, 213 F.3d 347 (7th Cir. 2000). In prosecution for making false statements on loan or credit applications, the defendant argued that the district court erred in refusing to grant him a new trial after the defendant discovered that one of the Government witnesses had engaged in an illegal embezzlement activity at the bank for which he worked as a loan officer. However, the Court of Appeals affirmed the district court's refusal to grant a new trial, noting that although the bank officer had engaged in an illegal activity, this evidence did not attack the fundamental finding that the bank where the person in question worked made a loan to another bank based on information provided by the defendant. Moreover, the new evidence in no way tended to prove that the defendant may have been innocent of the scheme. Finally, the witnesses' embezzlement activities were in no way connected to the defendant's participation in the bank fraud scheme. Accordingly, the Court of Appeals affirmed the defendant's conviction.

U.S. v. Crotteau, 2000 WL 943864 (7th Cir. 2000). In prosecution for bank robbery, the Court of Appeals affirmed the defendant's conviction over his challenges related to the introduction of expert testimony. First, the defendant argued that the district court erred in refusing to allow his proffered expert psychologist to testify regarding the dangers of eyewitness testimony. The Court of Appeals, however, rejected the argument and noted that, as a general rule, any weaknesses in the reliability of eyewitness testimony can be dealt with adequately through cross-examination. Moreover, the standard credibility instructions given in the case adequately cautioned the jury about the dangers of eyewitness testimony. Second, the defendant argued that the district court erred in refusing to allow him to present expert testimony regarding the height of the bank robber. Specifically, the defendant proffered a friend of his as an expert regarding his height and that of the bank robber. Both the district court and the Court of Appeals, however, concluded that this evidence was properly excluded because of the "expert's" lack of qualifications and methodology. Accordingly, the Court affirmed the defendant's conviction.

HABEAS CORPUS / §2255

U.S. v. Fountain, 211 F.3d 429 (7th Cir. 2000). On review based on the grant of a Certificate of Appealability, the Court of Appeals refused to consider issues raised by the defendant which were not explicitly authorized by the Court of Appeals' Certificate of Appealability. Specifically, the defendant's counsel addressed several issues not explicitly mentioned in the Certificate of Appealability. However, the order granting the Certificate of Appealability stated as follows: "Counsel shall address the following issue, as well any other issues he deems appropriate." The Certificate of Appealability then listed one issue. Counsel interpreted the order as allowing him to raise issues in addition to that listed in the Certificate of Appealability. The Court, however, faulted the defendant for raising other issues and stated that " it is obvious that only arguments directly addressing the specific ineffective assistance of counsel claim identified in the Certificate of Appealability would be appropriate and accordingly, we see no need to discuss any other issues." Thus, the Court of Appeals proceeded to consider only the issue of ineffective assistance of counsel certified for review and found that counsel had not been ineffective.

U.S. v. Blacharski, 2000 WL 706026 (7th Cir. 2000). On appeal from the denial of a 2255 petition alleging ineffective assistance of counsel, the Court of Appeals affirmed the district court's denial. The petitioner argued that he was denied the effective assistance of counsel in the entry of his plea of guilty because his counsel failed to advise him of a double jeopardy defense for violations of both 18 U.S.C. § 844(h) and the predicate offenses charging violations of 18 U.S.C. Section 844(i) and 26 U.S.C. § 5861. Specifically, these provisions provide punishment for both destroying a vehicle by means of an explosive and for carrying an explosive used in the commission of a felony. The defendant argued that Section 844(h) is a greater and included offense of the Section 844(i) and the Title 26 charges. However, the Court noted that Section 844(h) was intended to be used in addition to the predicate offense, not instead of it. Specifically § 844(h) states that whoever uses fire or an explosive to commit any felony which may be prosecuted in the Courts of the United States shall, in addition to the punishment provided for such felony, be sentenced to 10 years imprisonment. Accordingly, no double jeopardy concerns are implied and the defendant's counsel was therefore not ineffective for failing to raise such a defense.

Ryan v. U.S., 214 F.3d 877 (7th Cir. 2000). In this 2255 action, the Court of Appeals considered whether Custus v. United States 511 U.S. 485, (1994), means only that the time for the attack on a previous state conviction used to enhance a defendant's federal sentence was postponed to a collateral attack on the federal sentence. Specifically, the defendant was sentenced as a career criminal based on two previous qualifying convictions; one of which the defendant claimed was invalid. However, the defendant did not appeal the conviction in the state court system when the conviction was originally imposed. Rather, he sought to challenge the validity of this conviction in his 2255 petition, appealing his enhanced sentence based on that previous conviction. The Court of Appeals, however, held that a previous state court conviction cannot be challenged on appeal in a 2255 petition which seeks a reduction in sentence on the federal conviction. Accordingly, so long as the previous conviction remains on the books as of the filing date of the § 2255 Petition, the federal sentence is not subject to collateral attack premised upon an argument that a state court conviction (still on the books) used to enhance the federal sentence is invalid.

INEFFECTIVE ASSISTANCE

U.S. v. Febus, 2000 WL 968672 (7th Cir. 2000). In prosecution arising out of an illegal gambling operation, the

defendant argued that he was denied the effective assistance of counsel due to his attorney's failure to appear and represent him at a co-defendant's sentencing hearing. The defendant argued that because he was required to testify at that sentencing hearing pursuant to his plea agreement in order to receive his downward departure for substantial assistance, his attorney was required to be present. However, the Court of Appeals held that the Sixth Amendment does not entitle a defendant to counsel at a proceeding which is not an adversarial process against him, even though the proceeding may have a critical impact on the destiny of the defendant.

JURY INSTRUCTIONS

U.S. v. Frazier, 213 F.3d 409 (7th Cir. 2000). In prosecution for a drug conspiracy, the Court of Appeals affirmed the defendants' convictions over their argument that the district court improperly advised the jury of the necessary elements of an offense under 21 U.S.C. § 861(a)(1) of employing a minor for the purpose of distributing cocaine. Specifically, the defendant's contended that the jury should have been instructed that they had to know that the minor who was used to distribute cocaine was a juvenile in order to be convicted. The Court of Appeals, however, applying a plain error standard of review noted that other circuits have found that to require knowledge on the part of the defendant would undercut the legislative purpose of the criminal statute. Moreover, requiring knowledge merely encourages leaders of organizations like the defendants in this case to blind themselves to the ages of youths with whom they deal. Accordingly, the Court of Appeals joined the other circuits to have considered the issue and found that knowledge is not an element of the Section 861(a) offense

PROSECUTORIAL MISCONDUCT

U.S. v. Durham, 211 F.3d 437 (7th Cir. 2000). In prosecution for distribution of crack cocaine, the Court of Appeals affirmed the defendant's conviction over his argument that the prosecutor committed misconduct during closing argument. Specifically, during closing argument, the prosecutor referred to the defendant as a "slick little dope dealer who uses kids and exploits them to pedal poison." The prosecutor also referred to one of the defendant's witnesses as a "dope dealer and a liar." Finally, the prosecutor asked the jury to use its "good mid-western common sense" in analyzing the evidence. The Court of Appeals, however, found nothing objectionable in these comments because the court concluded that the remarks were supported by the evidence. Specifically, the court noted that substantial evidence was presented that the defendant dealt drugs and employed under age persons in his drug dealing operation. Secondly, the evidence showed that one of his witnesses was potentially a liar and the Government's comments were nothing but a statement as to the credibility of one of the defendant's witnesses. Finally, the court concluded that the reference to mid-western common sense did not constitute misconduct because could have easily benefitted the defendant; he being a mid-westerner himself. Moreover, the Court of Appeals noted that even if it were to assume for purposes of review that all the comments were improper, the prosecutor's comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process, especially given that no objection was made to the comments at the time of closing argument.

SEARCH AND SEIZURE

U.S. v. Moore, 2000 WL 703802 (7th Cir. 2000). In prosecution for the possession and receipt of child pornography, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. At the hearing on the motion to suppress, the evidence showed that an officer, after reviewing a magazine which be believed to contain child pornography, arrested the defendant who thereafter made incriminating statements to the police. The defendant argued that the police needed to obtain a warrant from a neutral magistrate prior to arresting him based on what an officer believed to be child pornography. The defendant argued that like obscenity, child pornography was not protected by the First Amendment, but because child pornography is often contained in presumptively protected materials, the First Amendment required that an officer seek a warrant prior to arresting someone based on his belief that presumptively protected materials contained child pornography. The Court of Appeals, however, noted that although a warrant is required before seizing material which contains alleged obscenity, the standard for determining what is child pornography is different from that for obscenity. Specifically, the standard for determining what constitutes obscenity requires an inquiry into community standards and norms which an inquiry into child pornography does not. Secondly, the arrest of a person, as in this case, does not implicate the same concerns as the seizure of presumptively protected materials. Where presumptively protected materials are seized, a possible prior restraint may occur. However, where a person is arrested

or seized, such concerns about prior restraint do not normally occur.

U.S. v. Jones, 214 F.3d 836 (7th Cir. 2000). On an appeal from the district court's denial of a motion to suppress evidence, the Court of Appeals affirmed the district court. The defendant argued that the manner in which the police conducted the search of his residence was unreasonable and therefore the evidence obtained therefrom should have been excluded. Specifically, the officers, after knocking on the door, found the door unlocked and opened it slightly. Notwithstanding the fact that the door was opened, the officers hit the door with a battering ram and it flew open. After one of the officers looked into the living room and saw no one around, he tossed in a concussion grenade, notwithstanding the fact that the officers knew that a small child lived at the residence. Finally, when the defendant appeared at a table approximately 15 to 20 feet from the front door, officers instructed him to get down. But when he instead stood up, he was tackled, struck on the right side of the neck, and handcuffed. The Court of Appeals noted that it was not convinced that the conduct of the officers was reasonable, especially in light of the fact that the officers had little reason to apply a battering ram to a door that was ajar and using a concussion grenade creating a risk that people close to the detonation point would be injured (especially a child who they knew was inside). Notwithstanding these concerns, however, the Court of Appeals affirmed the district court's denial of the motion to suppress evidence because, in its opinion, the exclusionary rule depends on causation. Specifically, the Court of Appeals applied the inevitable discovery doctrine and noted that the battering ram, grenade, and blow to the neck could affect the seizure of evidence only by surprising or stunning the occupant so that they could not destroy evidence. Thus, an argument that the suspects would have destroyed the drugs if only they had more time and full possession of their facilities is not a good reason to suppress probative evidence of a crime. Therefore, notwithstanding the unreasonable entry, the Court concluded that is was inevitable that the evidence discovered as a result of the search would have been discovered.

U.S. v. Matthews, 213 F.3d 966 (7th Cir. 2000). In this appeal, the defendant challenged electronic surveillance evidence gathered against him in the course of a court ordered wire tap on the phone of a suspected drug dealer. The Court of Appeals concluded that the wire tap was properly obtained. The defendant argued that although conversations of his were intercepted by the FBI during the course of the wire tap, the warrant seeking permission to apply the wire tap never identified him as a suspected target. Notwithstanding the fact that the Wire Tap Act requires that each application authorizing the interception of wire communications include the identity of the person, if known, committing the offense and whose communication are to be intercepted, the Court of Appeals relied upon the United States Supreme Court's decision in United States v. Donovan, 429 U.S. 413 (1977) in affirming the evidence obtained via the wire tap. The Court noted that a wire tap application may be approved if the district court determines that normal investigative techniques have failed or are not likely to succeed and there is probable cause to believe that: 1) an individual is engaged in criminal activity; 2) communications about the events will be obtained through interception and 3) the target facilities are being used in connection with the suspected criminal activity. So long as these standards are met and a judge concludes that the wire tap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawfully judicial authorization. Thus, in this case, given that there was no evidence that the government agents knowingly failed to identify the unnamed individuals (including the defendant) in an attempt to conceal relevant information that might have suggested that probable cause was lacking, suppression of the evidence obtained was not warranted.

U.S. v. Real Property, 2000 WL 892963 (7th Cir. 2000). In prosecution for manufacture of marijuana, the defendant argued that the police's use of thermal imaging equipment to detect his growing operation constituted an unreasonable, warrantless search of his residence. The Court of Appeals, relying upon its previous decision in United States v. Myers, 46 F.3d 668 (7th Cir. 1995), reaffirmed its holding that citizens have no reasonable expectation of privacy in the heat emitted from their homes, and that even if they did, such an expectation is not one that society would recognize as reasonable. Moreover, the Court of Appeals noted that all other circuits to have considered the issue agree with this conclusion.

SENTENCING

U.S. v. Lawuary, 211 F.3d 372 (7th Cir. 2000). In prosecution for distribution of crack cocaine, the Court of Appeals rejected the defendant's argument that the trial judge did not have jurisdiction to impose an

enhanced life sentence because the Government failed to satisfy 21 U.S.C. § 851(a)(1) by failing to file a written information stating the two prior convictions it was relying upon to impose the life sentence. The Court of Appeals noted that under § 851, the Government must provide written notice identifying the prior convictions upon which it relies. Adequate notice can be provided through various methods as long as the defendant receives sufficient written notice containing the necessary information before he enters into a guilty plea or goes to trial. In the present case, although the Government never filed a formal 851 notice, the Court of Appeals found that a number of other documents provided adequate notice to the defendants. Specifically, all the requisite § 851 information was printed on the first page of the plea agreement. Secondly, at the plea hearing, the Government orally advised the defendant that he would be sentenced in accord with § 851. Finally, at the plea hearing, the judge explicitly advised the defendant that his two prior Illinois drug convictions would result in a mandatory life sentence. Thus, the court held that the defendant was given adequate § 851 notice.

U.S. v. Grier, No. 98-1150 (7th Cir. 06/21/00). In prosecution for conspiracy to commit armed bank robbery, the Court of Appeals affirmed the district court's decision to refuse to depart downward based on an unjustified disparity among the sentences of the co-defendants. Specifically, while two of the defendants received sentences within the guidelines, a third cooperating co-defendant received a sentence of twelve months (12) home detention, far below his guideline range. Although the Court of Appeals noted that the departure for the third co-defendant was improper under the guidelines and therefore could be considered as an unjustified disparity, the Court nonetheless held that the district court properly refused to depart downward for the other defendants because of this disparity. Specifically, the Court of Appeals concluded that disparities between the sentences among the co-defendants ordinarily should not be considered as a factor in the decision to depart from the guidelines. Rather, the Court stated that the sentencing Court should consider only an unjustified disparity in the sentencing of co-defendants when the sentence imposed on the co-defendant is unjustified in length in comparison to the sentences imposed on all other individuals appropriately sentenced under the guidelines for similar criminal conduct. The Court of Appeals did note, however, that it refrained from holding that unjustified disparities may never be considered for as a basis for departure. Rather, in certain circumstances such as when an unjustified disparity is created by the abuse of prosecutorial discretion, the sentencing Court may consider the disparity as a factor in the determination of whether to depart.

U.S. v. Hamzat, 2000 WL 821740 (7th Cir. 2000). In prosecution for conspiracy to distribute narcotics, the Court of Appeals affirmed the defendant's sentence and once again emphasized the rule in this Circuit that where a defendant is not held accountable for all of the drugs involved in a criminal conspiracy, he may not thereafter seek a reduction for being a minor participant in the criminal activity. Specifically, the defendant at sentencing was held accountable for the 6.8 kilograms of crack he actually delivered and not the 60 kilograms attributable to him through the conspiracy. Therefore, according to the Seventh Circuit's rule, where the defendant is sentenced for only the amount of drugs he handled, he is not entitled to a § 3B1.2 reduction for playing a minor role in the conspiracy. However, the Third Circuit rejected this approach in United States v. Isaza-Zapata, 148 F.3d 236, 241 (3rd Cir. 1998); the Eighth Circuit rejected this approach in United States v. Snoddy, 139 F.3d 1224, 1231 (8th Cir. 1998); and the Ninth Circuit rejected the approach in United States v. Demers, 13 F.3d 1381, 1383-84 (9th Cir. 1994).

U.S. v. Hall, 212 F.3d 1016 (7th Cir. 2000). In prosecution for multiple counts related to drug distribution, the Court of Appeals affirmed the district court's refusal to downwardly depart based on an unjustified disparity between the defendant's sentence and that of his co-defendant. The Court of Appeals noted that a disparity among co-defendants' sentences is not ordinarily a valid basis to challenge a guideline sentence otherwise correctly calculated. Indeed, a disparity is justified when that disparity results from the proper application of the guidelines to the particular circumstances of a case. In the present case, the defendant challenging his sentence engaged in more serious criminal conduct in that he was a leader/organizer of the conspiracy and that he did not enter into a cooperation agreement with law enforcement authorities as did his co-defendant. Accordingly, the district court did not abuse its discretion in denying the motion for downward departure.

U.S. v. Kipta, 212 F.3d 1049 (7th Cir. 2000). In prosecution for bank fraud, the defendant challenged the district court's determination of the amount of loss attributable to her fraudulent conduct. The defendant deposited

over $171,355.00 into a bank account based on worthless checks. However, the actual loss incurred from these worthless checks amounted to only $39,219.00. The district court at sentencing determined the defendant's offense level based on the $171,000.00 figure, noting that this was the intended loss of the defendant's scheme. On appeal, the defendant argued that her base offense level should have been calculated based on the actual loss in the case. However, the Court of Appeals affirmed, noting that application note seven to U.S.S.G. § 2F1.1, requires district courts to increase the defendant's offense level based on the greater value of either the actual loss suffered by the victims of the fraud or the intended loss which the defendant attempted to inflict on the victim. Accordingly, the greater amount was the amount of loss which the defendant attempted to inflict on the victims and it was properly used as basis for calculating the defendant's offense level.

U.S. v. Wallace, 212 F.3d 1000 (7th Cir. 2000). In prosecution for armed bank robbery, the defendant argued on appeal that the district court improperly enhanced his sentence pursuant to U.S.S.G. § 2B3.1(b)(2)(B), for use of a firearm during the robbery. Specifically, the defendant argued that because the jury acquitted him of a 924(c) count, he should not have received the enhancement on the armed bank robbery charge. However, the Court of Appeals noted that the firearm enhancement for convictions under 18 U.S.C. § 2113 (armed bank robbery) is required by the guidelines. Moreover, his acquittal on the 924(c) count bore no relationship to this mandatory application of the guideline section to his count of conviction.

U.S. v. Taliaferro, 211 F.3d 412 (7th Cir. 2000). In prosecution for assaulting a federal officer while in the custody of the bureau prisons, the defendant argued that the district court improperly enhanced his offense level under 2A2.4(b)(1) for conduct that involved physical contact. Specifically, the defendant threw a cup of urine on the face and chest of one of the guards at the prison. However, the defendant argued that the guideline section applied only to actual physical contact between the defendant and the complaining witness. Therefore, because no such actual contact occurred in this case, the enhancement was not warranted. The Court of Appeals, however, rejected this argument, although it noted that neither the guidelines nor any other appellate decisions have elaborated upon the meaning of physical contact as used in the guideline section. The Court of Appeals therefore looked to existing law as it related to battery. A battery occurs where there is an intentional and wrongful physical contact with a person. Such contact need not to be direct but can rather result from the indirect application of force by some substance or agency placed in motion. Accordingly, looking to this definition, the Court of Appeals concluded that the throwing of a cup of urine on a prison guard amounts to physical contact with that guard and the three level upward adjustment was therefore warranted.

U.S. v. Gevedon, No. 99-1897 (7th Cir. 05/25/00). In prosecution for seven counts of federal firearm violations, the Court of Appeals affirmed the defendant's sentencing enhancement under U.S.S.G. § 2K2.1, because the defendant was a "prohibited person" in possession of illegal firearms. The defendant argued that he was not a prohibited person within the meaning of the guidelines because (1) he did not posses the weapons while he was a fugitive and (2) because he was not under indictment for a federal crime punishable by imprisonment for more than one year. The Court of Appeals rejected these arguments, first finding that although the defendant was a fugitive while the weapons remained at all times in the attic of his garage, possession can be established despite the fact that the firearm was not in the immediate possession or control of the defendant; rather constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others. The Court of Appeals also noted that constructive possession can be established by showing that the firearms were seized at the defendant's residence. Accordingly, in the present case, the defendant constructively possessed the weapons even though he was no longer living at the residence at the time they where taken from his attic. Evidence was presented that while he was a fugitive he asked others to go to the property and secure it and prevent others from accessing it. Accordingly, this evidence was sufficient to show that the defendant constructively possessed the weapons. Finally, the Court noted that although the defendant was not technically under indictment because the charges against him were filed by information, all the circuits to consider this question have held that the term under indictment includes a person charged by information. Accordingly, under both standards for prohibited persons, the defendant in this case was a prohibited person and therefore properly received the sentencing enhancement.

U.S. v. Brimah 214 F.3d 854 (7th Cir.

2000). In prosecution for distribution of heroin, the defendant argued that the district court erred in failing to apply the exclusionary rule at sentencing to bar the introduction of evidence that the district court determined was seized in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. The defendant relied upon circuit authority which argued forcefully that the exclusionary rule should apply at sentencing hearings, asserting that if the exclusionary rule is not applied at sentencing, the constitutional ban on unreasonable searches and seizures will become ineffectual. Indeed, according to these opinions, the potential under the guidelines for law enforcement officials to obtain a conviction on relatively minor conduct and seek a significantly enhanced sentence by introducing other evidence at sentencing necessitates the application of the exclusionary rule at sentencing. The Court of Appeals, however, noted that the exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a personal constitutional right. Thus, its application is restricted to those areas where its remedial objectives are most efficaciously served. The Court noted that although there is certainly a small risk that law enforcement officials will intentionally violate the defendant's Fourth Amendment rights in order to increase a sentence, it doubted that there are many police officers who would risk the fruits of prior legitimate law enforcement activities in so cynical a fashion. Moreover, the Court noted that all other nine circuits to have considered this issue have held that the exclusionary rule did not apply at sentencing. Finally, the Court noted that the broad language in the sentencing guidelines indicating that no limitations should be placed on the information concerning the background, character, and conduct of a person convicted of an offense also indicated a basis for refusing to apply the exclusionary rule at sentencing. Accordingly, the district court affirmed the defendant's sentence based upon 433 grams of heroin, which the district court had found to be illegally seized by the FBI.

U.S. v. Cardenas, 2000 WL 804550 (7th Cir. 2000). In prosecution for violation of 18 U.S.C. 922(g), the Court of Appeals affirmed the district court's enhancement of the defendant's sentence under the Armed Career Criminal Act. Two of the defendant's prior convictions qualifying him for the enhancement occurred on the same day and were crack sales to the same confidential informant; one occurring at 8:00 p.m. in the evening and the other occurring at 8:45 p.m. on the same day. The defendant argued on appeal that the two transaction constituted a single criminal episode. The Court of Appeals, however, affirmed the district court and noted that when determining whether or not two prior convictions constitute a single predicate offense under the ACCA, the Court must ask whether the defendant had sufficient time to cease and desist or withdraw from the criminal activity. In the present case, the sales of crack cocaine on the same date were two separate and distinct episodes because the sales were separated by 45 minutes and a half block. Accordingly, the defendant had plenty of time to "change his mind" and refuse to sell to the informants.

U.S. v. Dyer, 2000 WL 730658 (7th Cir. 2000). In prosecution for mail fraud, the Court of Appeals dismissed the case for lack of jurisdiction where the defendant argued that the district court erred when refusing to downwardly depart pursuant to U.S.S.G. § 5K2.13, which allows a sentence below the applicable guideline range if the defendant committed the offense while suffering from a significantly reduced mental capacity. In dismissing the case, the Court considered whether a district judge is required, as a precondition to granting a downward departure on the basis of the defendant's mental condition, to find that "but for" that mental condition, the defendant would not have committed the criminal conduct. The Court concluded that if a judge finds that despite a defendant's mental condition, he would have committed the crime anyway, there is no possible justification for reducing the sentence other than the judge felt sorry for the defendant, which would be just the kind ad hoc unfocused sentencing judgment that the guidelines seek to purge. In other words, if the crime would have occurred despite the defendant's mental illness, then curing the defendant's mental illness would not make him less likely to commit future crimes, and, therefore, no downward departure would be warranted.

U.S. v. Vivit, 214 F.3d 908 (7th Cir. 2000). In prosecution of a doctor for 16 counts of mail fraud based on a scheme where he and his patients submitted false claims to insurance companies that grossly overstated the amount of care he provided, the Court of Appeals affirmed the defendant's sentence over his five arguments on appeal. First, the defendant argued that guideline § 3B1.4, enhancing his sentence for the use of minors, was improperly applied in his case because the application violated the Ex Post Facto clause. Specifically, this provision was enacted on November 1, 1995, but all of the conduct related to minors in his case occurred before that

date. The Court of Appeals, however, rejected this argument. It first noted that one count for which the defendant was convicted occurred after the effective date of enhancement, although admittedly that count did not involve the use of a minor. Thus, given the fact that at least one count occurred after the effective date of the amendment, the question became whether or not the defendant's conduct straddled the enactment of the guideline provision, for where the defendant commits crimes that straddle the date promulgating new guideline provision, the defendant can be punished under a guideline effective after the beginning of the straddle period. Although noting that previous circuit authority determined that mail fraud is not a straddle offense in which the guidelines would allow application of the previously enacted guideline section, because the series of mail fraud convictions where grouped together under the guidelines, such grouping gave the defendant proper notice that such a possibility would occur and therefore satisfied any Ex Post Facto concerns. In other words, the grouping rules enacted in 1987 provide warning to criminals that contemplating another criminal offense similar to one committed previously places them in peril of sentencing under a revised version of the guidelines and therefore the Ex Post Facto Clause is not violated. Secondly, the defendant argued that the district court improperly enhanced his sentence pursuant to U.S.S.G. § 2F 1.1(b)(6)(A) for a risk of serious bodily injury. Specifically, the defendant argued that no patient was injured and any risk of serious injury was purely conjectural. For this reason, the district court lacked any evidentiary basis on which to base its enhancement. However, the Court of Appeals noted that the defendant failed to perform a number examinations for which he billed, which placed his patients at risk. Specifically, he failed to perform basic diagnostic tests such as taking blood pressure on certain patients or giving even rudimentary examination procedures for others. By failing to make these examinations, the defendant created a risk that had these patients suffered serious injuries, their injuries would remain untreated. Therefore the enhancement was properly applied. Finally, the defendant argued that the district court improperly enhanced his sentence for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3. Specifically, the defendant argued that he did not occupy a position of trust in relation to the insurance companies that he defrauded. However, the Court of Appeals noted that medical providers enjoy significant discretion and consequently lack of supervision in determining the type and quality of services that are necessary and appropriate for their patients. This forces the insurers to depend to a significant extent on a presumption of honesty when dealing with statements received from medical professionals. Accordingly, under such circumstances, whether the insurer is public or private, a doctor who defrauds an insurance company abuses a position of trust and the enhancement is therefore properly applied.

NON-SUMMARIZED CASES

U.S. v. Kincaid 212 F.3d 1025 (7th Cir. 2000) (in prosecution for possession of cocaine with intent to distribute, the Court of Appeals affirmed the defendant's conviction over his argument that the district court improperly denied his motion to suppress where officers searched his vehicle after a complaint was made that the vehicle was parked on private property and that the defendant had trespassed).

U.S. v Denberg, 212 F.3d 987 (7th Cir. 2000) (affirming the defendant's conviction for distribution of drugs over the defendant's argument that the district court erred in denying his motion to suppress where a third party gave consent to search his premises, the Court of Appeals concluding that the third party had actual authority to consent to a search where the evidence showed that she lived at the defendant's residence).

Mason v. U.S., 211 F.3d 1065 (7th Cir. 2000) (affirming the district court's dismissal of a 2255 petition, where the petitioner explicitly waived his right to a collateral attack in his plea agreement and his 2255 petition did not attack the effectiveness of his counsel in connection with the negotiation of the plea agreement).

U.S. v. Pike, 211 F.3d 385 (7th Cir. 2000) (affirming the district court's refusal to allow the defendant to withdraw his guilty plea where, contrary to the defendant's argument, the defendant did not have a viable defense to the charges to which he pleaded guilty and his counsel was not ineffective in explaining the charges to the defendant).

U.S. v. Gardner, 211 F.3d 1049 (7th Cir. 2000) (affirming the defendant's conviction for arson and using fire to commit a federal felony over the defendant's arguments that expert testimony was improperly introduced, that her conviction for arson and using fire to commit a felony violated the double jeopardy clause and, finally, that the evidence was insufficient to support her conviction).

U.S. v Stoecker, 2000 WL 706024 (7th Cir. 2000) (affirming the defendant's conviction for bank fraud and false statements to a financial institution over numerous challenges to the district court's introduction of evidence at trial).

U.S. v. Milquette, 214 F.3d 859 (7th Cir. 2000) (affirming defendants' drug convictions over challenges to the validity of their guilty pleas and various sentencing enhancements).

U.S. v. Chalvaz-Chalvaz, 213 F.3d 420 (7th Cir. 2000) (dismissing the defendant's appeal for want of jurisdiction where the defendant argued that the district court did not depart downward enough).

U.S. v. Stokes, 211 F.3d 1039 (7th Cir. 2000) (affirming the defendant's conviction for drug related crimes).

U.S. v. Whitt, 211 F.3d 1022 (7th Cir. 2000) (affirming the defendant's drug conspiracy conviction over his argument that the government presented evidence of multiple conspiracies rather than a single conspiracy and that the district court relied upon unreliable evidence when determining the drug quantity for sentencing purposes).

U.S. v. Austin, 2000 WL 769246 (7th Cir. 2000) (affirming the district court's refusal to give an addict informant instruction, noting that the Court of Appeals has never reversed a district judge for omitting an addict informant instruction).

Moran v. Sondalle, No. 00-1190 (7th Cir. 06/22/00) (dismissing the defendants' appeals where they challenged their transfer to an out-of-state prison through a writ of habeas corpus where, instead, such a challenge by a prisoner in state custody must be litigated under 42 U.S.C. § 1983).

U.S. v. Williams, 2000 WL 777775 (7th Cir. 2000) (affirming the defendant's conviction for conspiracy to distribute crack over his sufficiency of the evidence, 404(b), and sentencing arguments).

U.S. v. Simmons, 2000 WL 760687 (7th Cir. 2000) (affirming the district court's upward departure in prosecution for criminal contempt for refusal to testify where the defendant originally testified on behalf of the government in exchange for a significant reduction in his sentence, but thereafter refused to testify on the re-trial in the same case).

U.S. v. Cashman, 2000 WL 739243 (7th Cir. 2000) (affirming the defendant's convictions for manufacture of methamphetamine over an argument that the district court improperly denied a motion to suppress and improperly enhanced the defendant's sentence for possessing a dangerous weapon while committing the offense).

U.S. v. May, 214 F.3d 900 (7th Cir. 2000) (affirming the defendants' convictions for armed bank robbery over their argument that the district court improperly denied their motion to suppress and that they were denied a fair trial because the district judge allowed the jury to deliberate after it received a note from the jury foreperson, which, according to the defendant, suggested that one of the jurors was less than truthful during voir dire examination).

Louis v. Miller, 2000 WL 869575 (7th Cir. 2000) (rejecting a state court habeas petitioner's claim).

Pierre v. Cowan, 2000 WL 862521 (7th Cir. 2000) (reversing the district court's finding of procedural default in a state capital habeas petition in a very fact intensive opinion).

U.S. v. Dikeocha, 2000 WL 823455 (7th Cir. 2000) (affirming the defendant's conviction for conspiracy to distribute heroin over his objection to the introduction of evidence and the determination at sentencing of the quantity of drugs involved in the conspiracy).

U.S. v. Simmons, 2000 WL 823445 (7th Cir. 2000) (affirming the defendant's convictions for drug distribution over his objection that the district court improperly calculated the amount of drugs involved, that his sentence was disproportionate to his co-defendant's, and that the district court wrongly denied him acceptance of responsibility).

U.S. v. Ledford, 2000 WL 823437 (7th Cir. 2000) (affirming the defendant's armed bank robbery conviction over his argument that the district court erred in refusing to suppress evidence and in enhancing his sentence for infliction of bodily injury on one or more persons).

U.S. v. Zehm, 2000 WL 862841 (7th Cir. 2000) (affirming the defendant's convictions for distribution of methamphetamine over various sentencing arguments, including the argument that the district court improperly calculated the amount of drugs involved, improperly denied him acceptance of responsibility, and improperly enhanced his sentence for possession of a dangerous weapon).

U.S. v. Bradley, 2000 WL 816079 (7th Cir. 2000) (affirming the defendant's sentence over his argument that the district court improperly sentenced him

as a career offender).

U.S. v. Quintanilla, 2000 WL 816080 (7th Cir. 2000) (affirming the defendant's 922(g) conviction over his argument that the district court improperly denied his motion to suppress and that the government failed to provide sufficient evidence to support his conviction).

U.S. v. Andreas, 2000 WL 816078 (7th Cir. 2000) (affirming the convictions of defendants involved in the criminal conspiracy related to Archer Daniels Midland, over numerous arguments on appeal).

Spreitzer v. Schomig, 2000 WL 968539(7th Cir. 2000) (affirming the dismissal of a capital habeas petitioner's habeas petition on the ground of procedural default).

U.S. v. Brumley, 2000 WL 960521 (7th Cir. 2000) (affirming the defendant's drug conviction over his arguments that his confession was not voluntary, that a DEA expert's testimony was improper, that the indictment was prejudicially ambiguous, and that the district court erred when it refused to depart downwardly at sentencing because of a disparity between his sentence and that of his co-defendant).

Lear v. Cowan, No. 99-2564 (7th Cir. 03/21/00) (affirming denial of capital habeas petitioner's habeas corpus petition).

U.S. v. Smith, 2000 WL 968669 (7th Cir. 2000) (affirming the defendant's mail fraud conviction over her argument that her confession was not voluntary and the district court improperly determined the amount of loss in the case).

Reversible Error

[**Caveat**: For those who have not previously seen this column, it is a collection of federal appellate decisions in which a defendant received relief. The summaries are no substitute for reading the opinions. They are merely to draw your attention to cases that may help your own research.]

United States v. Lawrence, 189 F.3d 838 (9th Cir. 1999) (Testimony regarding defendant's marriage was more prejudicial than probative).

United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999) (Drug quantities not supported by evidence).

United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999) (Requiring more proof of paternity from father than mother, to show citizenship, denied equal protection).

United States v. Garrett, 189 F.3d 610 (7th Cir. 1999) (Guilty plea colloquy was not admission to crack, as opposed to powder, for sentencing purposes).

United States v. Riley, 189 F.3d 802 (9th Cir. 1999) (Intentional destruction of notes of interview with informant violated Jencks Act).

United States v. Heath, 188 F.3d 916 (7th Cir. 1999) (Previous arrest was not admissible prior bad act).

United States v. Anderson, 189 F.3d 1201 (10th Cir. 1999) (Titling vehicle in mother's name did not prove money laundering).

United States v. Anderson, 188 F.3d 886 (7th Cir. 1999) (Prior bad act was more than 10 years old).

United States v. Shipsey, 190 F.3d 1081 (9th Cir. 1999) (Court's instruction to jury constructively amended indictment).

United States v. Walker, 191 F.3d 326 (2nd Cir. 1999) (Insufficient proof than defendant was responsible for more than 100 false immigration documents).

United States v. Hernandez, 189 F.3d 785 (9th Cir.), *cert. denied*, 120 S.Ct. 1441 (1999) (Venue was improper for undocumented alien discovered in one district and tried in another).

United States v. Messner, 197 F.3d 330 (9th Cir. 1999) (1. Speedy Trial Act exclusion for arrest of co-defendant did not apply to unreasonably long delay; 2. Coded language did not support money laundering conviction).

United States v. McSwain, 197 F.3d 472 (10th Cir. 1999) (Conspiracy to manufacture and distribute are lesser offenses of CCE).

United States v. Barnett, 197 F.3d 138 (5th Cir. 1999) (Insufficient evidence of conspiring or aiding and abetting murder for hire).

United States v. Pigee, 197 F.3d 879 (7th Cir. 1999) (Jury instruction constructively amended indictment).

United States v. Miranda, 197 F.3d 1357 (11th Cir. 1999) (Ex post facto application of money laundering conspiracy statute).

United States v. Fowler, 198 F.3d 808 (11th Cir. 1999) (Restoration of rights by state did not prohibit firearms possession).

Prou v. United States, 199 F.3d 37 (1st Cir. 1999) (Counsel failed to attack

timeliness of statutory drug enhancement).

United States v. Rodriguez-Lopez, 198 F.3d 773 (9th Cir. 1999) (Government need not consent to departure for stipulated deportation).

United States v. Dortch, 199 F.3d 193 (5th Cir.), *amended*, 203 F.3d 883 (2000) (Continued detention after traffic stop was unreasonable).

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999) (Improper enhancement for use of private plane in drug case).

United States v. Waites, 198 F.3d 1123 (9th Cir. 2000) (Conduct that was regulated federally should not have been prosecuted under Assimilative Crimes Act).

United States v. Owusu, 199 F.3d 329 (6th Cir. 2000) (Insufficient evidence of drug distribution).

United States v. Eustaquio, 198 F.3d 1068 (8th Cir. 1999) (No reasonable suspicion to search bulge on defendant's midriff).

United States v. Olaniyi-Oke, 199 F.3d 767 (5th Cir. 1999) (Purchase of computers for personal use was not money laundering).

United States v. Johnston, 199 F.3d 1015 (9th Cir. 1999) (Forfeited money should have been subtracted from restitution).

United States v. Guidry, 199 F.3d 1150 (10th Cir. 1999) (Defendant must have relationship of trust with victim for abuse of trust to apply).

United States v. Harstel, 199 F.3d 812 (6th Cir. 1999) (Receipt of mailed bank statements was not a fraudulent use of mails).

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*Our thanks to **Alexander Bunin** Federal Public Defender for the Districts of Northern New York and Vermont who allows us to reproduce and distribute these cases in our newsletter.*

The Back Bencher

Published by: The Seventh Circuit Federal Defenders

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